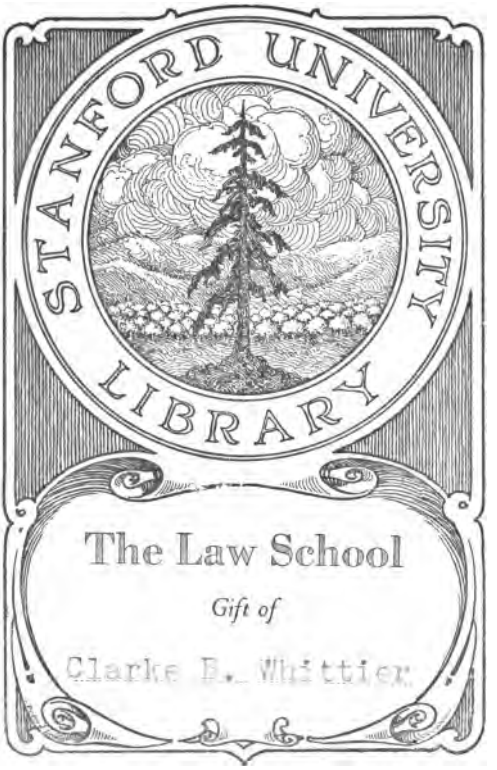
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ILLINOIS CASES

COMMON LAW PLEADING

EDITED BY
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SECOND EDITION

CHICAGO
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1909

PREFACE TO SECOND EDITION

A number of new cases have been added in the present edition and it is hoped that the usefulness of the compilation has thus been considerably increased. The selection has been made primarily for the use of students in The John Marshall Law School as a supplement to the study of a standard text book. Attention has been given chiefly to points which seemed to the editor to be of practical importance to beginners.

Tribune Building, Chicago, February, 1909.

ILLINOIS CASES ON COMMON LAW PLEADING.

(1) MARQUETTE THIRD VEIN COAL CO. v. DIELIE.

208 Ill. 117; 70 N. E. 17 (1904).

Hand, C. J. This is an action commenced in the Circuit Court of Bureau County by the appellee, a minor under the age of fourteen years, by his next friend, against the appellant, to recover damages for a personal injury sustained by him while in the employ of the appellant as a "trapper" in its coal mine. The case was tried upon a declaration containing three counts. The first count charged the appellant with negligence in failing to provide appellee a safe place in which to work. The second count charged the appellant with a willful violation of the twenty-second section of mines and miners act (Hurd's Rev. St., 1899, c. 93), in having employed and permitted appellee, a minor under the age of fourteen years, to work in its mines, and without having produced to it, by him, an affidavit that he was fourteen years of age, by means whereof he was injured. The last count charged that plaintiff was under fourteen years of age; that the defendant was aware of that fact; and that he was carelessly, negligently, unlawfully, and wrongfully employed by the defendant to work in its mine; and that by reason of being permitted to work in said mine, and because of his youthful indiscretion,, he was injured. The general issue was filed, and a trial resulted in a verdict and judgment in favor of appellee for the sum of $4,000, which judgment has been affirmed by the Appellate Court for the Second District, and a further appeal has been prosecuted to this court.

It is first contended that there is a misjoinder of causes of action in the several counts of the declaration, the position

of the appellant being that an action for negligence at common law in failing to furnish appellee a safe place in which to work, and an action for a willful violation of the mines and miners act by employing and permitting appellee, a minor under fourteen years of age, to work in its mine, and without having produced to it, by him, an affidavit that he was fourteen years of age, can not be joined in the same declaration. The counts are based upon the same state of facts, and if the appellant is liable to appellee for damages for negligence as at common law, and also liable to him for damages by reason of a willful violation of the mines and miners act, no valid reason has been suggested why said causes of action may not be joined in different counts of the same declaration. To hold otherwise would be to hold that appellee must bring two actions against the appellant based upon the same state of facts, or abandon one of said causes of action.

The test by which to decide as to the joinder of counts—that is, what actions may be joined in separate counts of the same declaration—is thus stated in Chitty's Pleadings (volume, 1, p. 200): "The result of the authorities is stated to be that 'when the same plea may be pleaded and the same judgment given on all the counts of the declaration, or whenever the counts are of the same nature, and the same judgment is to be given on them all, though the pleas be different, as in the case of debt upon bond and on simple contract, they may be joined.'"

In Hays v. Borders, 1 Gilman 46, on page 50, the rule is announced in substantially the same language. It is there said: "It is objected to the declaration that it is defective by reason of a misjoinder of counts and causes of action, in this: that it contains counts for a penalty founded on statute, and others for such damages as could have been recovered at common law. The result of authorities on the subject of the joinder of different forms of action is said to be that 'when the same plea may be pleaded and the same judgment given on all the counts of the declaration,' or 'wherever the causes of action are of the same nature, and

may properly be the subject of counts in the same species of action, they may be joined; otherwise they can not.'"

In Brady v. Spurck, 27 Ill. 478, on page 482, the court, again speaking upon the subject through Mr. Justice Breese, said: "The rules of correct pleading allow several causes of action of the same nature to be joined in one count and a recovery had pro tanto. The defendant can plead specially to each cause of action. Godfrey v. Buckmaster, 1 Scam. 477. Different actions can not be joined in the same declaration. The rule is that, when the same plea may be pleaded and the same judgment rendered on all the counts, they may be joined."

In Fairfield v. Burt, 11 Pick. 244, the court, through Mr. Chief Justice Shaw, on page 246 said: "It is further objected that a count on the statute for double damages can not be joined with counts at common law for damages of like kind. It is difficult to perceive how, either upon principle or authority, this position can be maintained. The form of action is the same. The statute of 1812 (chapter 146, §3), providing that the owner of a dog shall forfeit and pay double the damage done by such dog, further provides that it may be recovered by action of trespass. It only affects the rule of assessing damages. The plea is the same, and the judgment is the same, and therefore the case comes within the rule regulating the joinder of causes of action."

It is the practice in this State to try personal injury cases under declarations the separate counts of which charge negligence and willful and wanton misconduct (Chicago Terminal Transfer Railroad Co. v. Gruss, 200 Ill. 195, 65 N. E. 693); and, although the rules of law as applied to the separate counts of such a declaration are not the same, it has never been thought for that reason such counts could not be joined in the same declaration. We are of the opinion there was no misjoinder of counts or causes of action in said declaration, but that the counts for negligence at common law and for a willful violation of the statute were properly joined in said declaration.

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant asked the court to peremptorily instruct the jury to return a verdict in its favor, which the court declined to do. This evidence introduced on behalf of plaintiff fairly tended to show that he was a minor under the age of fourteen years; that he was in the employ of the defendant as a "trapper," for which service he was paid one dollar per day; that it was his duty to open certain doors in an entry in the mine for cars drawn by mules to pass through, and to immediately close the doors after the cars had passed, and to keep them closed except when cars were passing, in order to prevent the escape of air which had been forced into the mine, and, when the cars were stalled in the vicinity of his doors, to assist the driver in starting the cars. He had charge of two doors, situated about forty feet apart. On the 26th of April, 1902, a train of cars became stalled near appellee's doors. He went to the assistance of the driver, got behind the cars, and blocked the rear wheels when the mules stopped, to prevent the train from backing down the grade. When the train was started, to get to the doors and open them that the train might pass through, it was necessary for him to pass the cars when they were in motion. At a point between where the cars had stalled and his doors, a timber projected from the wall to within a few inches of the cars. He had passed the place frequently, but testified that he had not observed the proximity of the timber to the cars as they passed it. He was caught between the timber and the cars and seriously injured.

At the time appellee entered the employ of appellant he was under thirteen years of age, and had been in its employ about five months at the time of the injury, and no affidavit was produced by him to the defendant or its mine manager, at the time he entered its employ, that he was fourteen years of age. The statute is as follows: "No boy under the age of fourteen years, and no woman or girl of any age shall be permitted to do any manual labor in or about any mine, and before any boy can be permitted to

work in any mine he must produce to the mine manager or operator thereof an affidavit from his parent or guardian or next of kin, sworn and subscribed to before a justice of the peace or notary public, that he, the said boy, is fourteen years of age." Hurd's Rev. St. 1899, c. 93, § 22. Section 33 of said act makes any willful neglect, refusal, or failure to do the things required to be done by any provision of the act on the part of a person required to do them, or any violation of any of the provisions or requirements of the act, a misdemeanor, punishable by fine or imprisonment. It also enacts: "For any injury to person or property, occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby."

If the evidence fairly tends to support the cause of action set out in the declaration, it is the duty of the court to submit the case to the jury. We think the evidence found in this record fairly tended to support the several causes of action set out in the different counts of the declaration, and that the court did not err in refusing to take the case from the jury.

It is also urged that the last count of the declaration is insufficient, in that it does not charge a willful violation of the statute. The statute provides that a willful violation thereof, or a willful failure to comply with its provisions, shall give a right of action against the mine owner to a person injured, for any direct damages which the injured party may sustain by reason of such violation. The count charges the plaintiff was under fourteen years of age; that the defendant had notice of that fact, yet it wrongfully and unlawfully employed plaintiff and permitted him to work in its mine, contrary to the statute, etc. A willful violation, within the meaning of the statute, signifies a conscious violation thereof. Odin Coal Co v. Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45; Donk Bros. Coal & Coke Co. v. Peton, 192 Ill. 41, 61 N. E. 330. The sufficiency of the count was not challenged by demurrer or otherwise, and

we think the averment "wrongfully and unlawfully," found in the count, a sufficient averment of the conscious violation of the statute after verdict. * * *

(2) BATES v. BATES MACHINE CO.
230 Ill. 619; 82 N. E. 911 (1907)

Hand, C. J. This was an action on the case, commenced by the appellee against the appellant, to recover damages alleged to have been sustained by the appellee in consequence of the appellant having fraudulently and deceitfully assigned and transferred to the Consolidated Steel & Wire Company, instead of to the appellee, as he was bound to do by his contract in writing bearing date January 28, 1888, certain patents issued to him by the United States covering a woven wire fence and the machine for manufacturing such fence, which fence and machine were the inventions of appellant. A jury was waived, and a trial before the court resulted in a judgment in favor of the appellee for the sum of $55,800, which, on appeal, was affirmed by the Appellate Court for the Second District, and a further appeal has been prosecuted to this court.

The case was tried upon a declaration containing five counts, to which the appellant interposed the plea of the general issue and three special pleas; the last special plea being that of the five-year statute of limitations. A demurrer was sustained to all of said special pleas, and, the appellant having preserved proper exceptions to the ruling of the court in that regard, it is here urged by the appellant as ground of reversal that the court erred in sustaining the demurrer to the plea of the five-year statute of limitations filed by him in bar of said action. Section 15 of chapter 83 of the Revised Statutes, entitled "Limitations" (Hurd's Rev. St. 1905, p. 1333), reads as follows: "Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the deten-

tion or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." The usual action brought to recover damages for a breach of contract not under seal is assumpsit, but an action on the case will lie where, at the time of the breach of a written contract, a fraud is also committed upon the other party to the contract by the party violating the contract; and in this case the appellee appears to have waived its right to sue in assumpsit for the breach of the written contract, and to have elected to bring an action in case against the appellant for the wrong committed by the appellant in fraudulently and deceitfully assigning and transferring said patents to the Consolidated Steel & Wire Company instead of to it, as it was averred it was his duty to do by virtue of the terms of the written contract of January 28, 1888. The action was, therefore, not based upon the written contract, but was based upon the fraudulent acts of the appellant in making the assignment and transfer of said patents to the said Consolidated Steel & Wire Company, and the only office of the written contract was to establish a duty from the appellant to the appellee to transfer to it said patents. We think, therefore, that it cannot be said, as is contended by the appellee, that section 16 of the limitation act, which provides that actions upon "written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued," applies in this case, but think, as there is no specific provision in the limitation act which applies to actions on the case for fraud and deceit, the provision found in section 15 of the limitation act which provides that "all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued," is the limitation that must control in this case, and that the court erred in sustaining the demurrer of the appellee to said plea of the statute of limitations.

In Knight v. St. Louis, Iron Mountain & Southern Railway Co., 141 Ill. 110, 30 N. E. 543, it was held that the

10-year limitation provided for in section 16 of the limitation act will not apply by reason of the fact alone that a cause of action is supported by evidence in writing, but that the 10-year limitation applies only when a cause of action is upon a contract in writing or upon other evidences of indebtedness in writing, and it is generally held in those states where, as in Illinois, the common-law forms of action remain in use, that the statute does not fix the bar by the cause of the action but by the form of the action. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 268. In Christy v. Farlin, 49 Mich. 319, 13 N. W. 607, the plaintiff brought an action of assumpsit for the breach of the covenant of seizin in a deed. The 6-year statute of limitations was pleaded, which was the limitation which applied to an action of assumpsit. It was, however, contended that the 10-year limitation, which barred an action of covenant (as the action was brought upon a covenant contained in a deed), should be applied. It was, however, held that it was the form of the action which fixed the bar, and that the plaintiff having sued in assumpsit, the 6-year limitation, which applied to the action of assumpsit, and not the 10-year limitation, which applied to an action of covenant, must be applied.

The court having erred in sustaining a demurrer to said plea of the statute of limitations, the judgments of the circuit and Appellate Courts will be reversed, and the cause remanded to the circuit court for further proceedings in accordance with the view herein expressed.

Reversed and remanded.

Carter, J. (dissenting). I do not concur in this opinion. I think the judgments of the lower courts are correct. My reasons are sufficiently set forth in the opinion of Mr. Justice Farmer, handed down in the Appellate Court. Bates v. Bates Machine Co., 120 Ill. App. 563.

Farmer and Vickers, JJ., took no part in the consideration or decision of this case.

(3) C. & A. R. R. CO. v. MURPHY.

198 Ill. 462; 64 N. E. 1011 (1902)

Wilkin, J. This action on the case was brought by the appellee against the Chicago & Alton Railroad Company and Frederick P. Bagley in the Superior Court of Cook County. The declaration contained three counts, in the first of which it was alleged that the plaintiff on the fourth day of May, 1897, purchased of the railroad company a passenger ticket from the city of Chicago to Springfield, Mo., and then became a passenger from said city of Chicago to said destination, and thereupon it became and was the duty of the said defendant railroad company to use due care and diligence in carrying him, and in the management and running of its trains for that purpose; to use due care and diligence to prevent the plaintiff from being injured by dangerous structures and things in and upon said train, and in and upon and along the course of said railroad, while he was thus being carried; to use due care and diligence in watching for and avoiding impending danger and dangerous structures and things in and upon said train, and in and upon and along the course of said railroad, while said plaintiff was being carried by said defendant; yet it did not regard its duty as aforesaid, but, on the contrary thereof, ran and managed said train in such a manner as to bring it with force and violence in contact with a certain large stone, weighing forty tons, which was then possessed and controlled by the said defendant, Frederick P. Bagley at a point near Eighteenth street, upon said railroad, in the city of Chicago, and that the said Bagley did then and there willfully, maliciously, wantonly, carelessly, and negligently handle and manage said stone, by means of a derrick and crane, in such a manner as to bring said stone with great force and violence in contact and collision with said train wherein said plaintiff was a passenger, and by means aforesaid the said stone was then and there carelessly, willfully, maliciously, and negligently hurled with great force and violence by said defendant Frederick P.

Bagley into, upon, and against said train wherein the plaintiff was then and there a passenger, by means of which the plaintiff was then and there thrown with great force and violence to and upon the floor of a certain car in said train to and upon the ground, by means of which his head was greatly injured, etc.; describing at length the nature of his injuries, and alleging the expenditure of money in being cured of such injuries. The second and third counts are for the same injury, but the second charges the railroad company alone, and the third the defendant Bagley alone. The suit was first brought in the name of the plaintiff, "suing for the use of August Haley." Pleas of not guilty were filed by both defendants. During the trial, which was by jury, the plaintiff was asked whether he had assigned his claim to Haley, which was objected to by counsel for the plaintiff, and the objection sustained. Thereupon the plaintiff, by leave of the court, amended his declaration by striking out "suing for the use of August Haley." Counsel then asked leave to plead over, but that leave was denied, and the trial proceeded upon the issues made by the pleas of not guilty then on file. The jury returned a verdict in favor of the plaintiff for $6,000. The defendants entered their motions for a new trial and in arrest of judgment, both of which were overruled, and judgment entered upon the verdict. The defendants prosecuted separate appeals to the Appellate Court for the First District, and the branch of that court, after requiring the plaintiff to enter a remittitur of $3,000, affirmed the judgment of the Superior Court. The defendants both appeal to this court, and have filed separate briefs and arguments. At the close of plaintiff's evidence, and again at the close of all the evidence, the usual motions for an instruction to the jury to find the issues for the defendants were made and overruled.

It is insisted by counsel for Bagley that the trial court erred in allowing plaintiff to amend his declaration by striking out the words "suing for the use," etc. The claim was not assignable, and the use of those words was mere surplusage. Railroad Co. v. Lundahl, 183 Ill. 284, 55 N.

E. 667. The amendment was only a matter of form, and no further pleas were necessary, or could have been filed.

It is urged by both defendants that the refusal to sustain the motion in arrest of judgment, which was based upon the fact that there was a misjoinder of counts in the declaration, was error. It was improper to join in the same declaration a count against the two defendants, with counts against each of them severally. Of course, joint tort feasors may be sued jointly or severally, but they cannot be sued severally in the same action. It is undoubtedly also true that at common law a misjoinder of counts could be taken advantage of by motion in arrest of judgment or on error, but we do not think that rule should be applied in this state. By section 24 of our practice act, amendments before final judgment may be allowed on such terms as are just and reasonable, introducing new parties plaintiff or defendant, discontinuing as to any joint plaintiff or defendant, changing the form of action, and in any matter either of form or substance, or in any process, pleading, or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense. Section 6 of the statute of amendments and jeofails (Hurd's Rev. St. 1899, p. 142) is as follows: "Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the court, or upon confession nil dicit or non sum informatus, or upon any writ of inquiry of damages, be reversed, impaired, or in any way affected, by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records, namely: * * * Fifth, for any mispleading, insufficient pleading," etc. A misjoinder of counts in the same declaration is a "mispleading," as that term is used in this statute. It was so held in Lovett v. Pell, 22 Wend. 375, in which Senator Verplanck said: "I think that, according to the sense and intention of our enlarged statute of amendments, 'mispleading' includes within its sense a misjoinder of counts. The word is frequently employed in a narrower

sense, but it may very well be used with various degrees of latitude, since the word 'pleading,' on which it is formed, is used with still greater. Neither that word, nor its derivative, 'mispleading,' are words of precise definition and unvarying meaning, but are understood with more or less latitude, according to the context and the intent and object for which they are used. * * * 'Mispleading,' in its immediate, and, I suppose, more usual, sense, signifies essential errors or omissions in the defendant's defense, but it is also expressly defined to comprehend 'any mistakes or omissions essential either to the action, or defense occurring either in the declaration or the subsequent pleading.' See Tidd, Prac. 954. According to this larger and broader sense, the word must comprise, as one species of mistakes essential to the action, such a misjoinder of counts as would be bad on demurrer, and it would fall strictly within the intention of our statute that such a mistake should be cured after verdict, when no prejudice has been done by it to the substantial justice of the cause and all rights of the parties." If the contention on the motion in arrest of judgment had been urged by way of demurrer to the declaration, the plaintiff could readily have removed the objection by striking out the second and third counts, and would doubtless have done so. We entertain no doubt as to the correctness of the ruling upon the motion in arrest of judgment. There was a count against both defendants, which the verdict of the jury followed, and upon which the judgment below is based. * * *

(4) HAYES v. MASS. LIFE INS. CO.
125 Ill. 632 (1888).

[Opinion by Mr. Justice Shope.]

* * * In so far, then, as the right of plaintiffs in error to a recovery depended upon the existence of the facts averred in the first and second counts of the declaration, the adverse determination and finding of the Appellate Court is conclusive. But the declaration upon which

the parties went to trial contained three counts—the first and second, in form, counts in case, and the third a count in trover, for the wrongful conversion of the policy of insurance. There was not a misjoinder of actions, for counts in case and trover may be joined. (1 Chitty's Pl. 199.) And trover will lie for the wrongful conversion of valuable papers, or evidences of title to real or personal property, for checks, promissory notes, bank bills, bonds, bills of exchange, drafts, certificates of stock in incorporated companies, securities of any kind, books of account, vouchers, etc. (Garvin v. Wiswell, 83 Ill. 215; Alexander v. Rundle, 75 id. 85; 6 Wait's Actions and Defenses, title "Trover," and cases there cited), and for a policy of insurance. Harding v. Carter, opinion by Lord Mansfield, referred to and cited in 1 Park on Marine Insurance, 4. * * *

(5) GAY v. DE WERFF.
17 Ill. App. 420 (1885).

[Trespass vi et armis. Opinion by Green, J.]

* * * Counsel for appellee suggests that the distinction between trespass and case having been abolished in this state by statute, and that some evidence in the trial below tended to show that Gay prosecuted De Werff maliciously, therefore for this malicious prosecution the latter could recover under his declaration in trespass. Even if the facts proven had established a malicious prosecution of De Werff, as suggested, the law is not as counsel for appellee claims. The construction of this statute, given by our Supreme Court and by the Appellate Court in this state, is that the provision of the statute does away with the technical distinction between the forms of action, but does not give any other remedy for acts done under the legal process of a court of competent jurisdiction than before existed, viz., an action on the ground of malice and want of probable cause; also that counts in trespass and in case may be joined in one declaration and the action be called trespass or case, but the count in case must contain all the elements

necessary to make a good cause of action in case, and the count in trespass in like manner must contain all the elements to make a good cause of action in trespass; also that the rule, in all actions the proof must correspond with the allegations, is not repealed by the statute. Blacklock v. Randall, 76 Ill. 224; St. Louis, V. & T. H. R. R. Co. v. Town of Summit, 3 Bradwell, 160. * * *

(6) CITY OF CHICAGO v. SELZ, SCHWAB & CO.

202 Ill. 546; 67 N. E. 386 (1903)

Cartwright, J. On June 8, 1900, the appellee, Selz, Schwab & Co., a corporation, owned a building on the northwest corner of Monroe and Market streets, in the city of Chicago. There was a fire hydrant in front of the building, connected at the bottom with the water main in the center of the street by a pipe six inches in diameter. It constituted a part of the water works system of the appellant city of Chicago, and was under its control. In the evening of that day there was a leak at the bottom of the hydrant, and some water was coming from the leak through small crevices in the floor of the basement of the building. Appellee's manager telephoned the fact to the city hall, and also went twice that evening to the proper department, and endeavored to have the leak attended to and stopped. Nothing was done, and the manager waited until about 12:45 that night, when he went home. In the morning, efforts were again made to have the city look after the leak, and after nine o'clock the manager succeeded in getting a foreman connected with the water department to attend to the matter. The manager urged the foreman to have the water shut off, for fear that more damage would result, but the foreman attempted to get down to the joint without shutting off the water. He set his men to work digging out the manure from the hydrant basin, and in doing this they moved the hydrant first to one side of the basin and then back. The pressure of the water was about thirty-five pounds to the square inch, and the

result was that the connection was broken at the bottom of the hydrant, the pipe blew out, and the rush of water made a hole through the side of the basin into the basement of the building, damaging the goods stored therein. Appellee brought this suit in the Superior Court of Cook County to recover its damages, and, a jury being waived, the issue was submitted to the court for trial under a stipulation that, if the city was liable, the damages should be assessed at $27,100. The court found the issue for the plaintiff and assessed the damages at the amount fixed by the agreement, and entered judgment accordingly. The Branch Appellate Court for the First District affirmed the judgment.

Counsel for appellant seem to have overlooked or misapprehended every rule of this court relating to the form and contents of briefs and arguments. A volume entitled as a brief has been filed, which is a compound of statement and argument on controversed questions of fact, bearing evidence that it was addressed to the Appellate Court, with what is called a "digest of the evidence," printed by question and answer, and analyses of the opinions of the Superior Court and Appellate Court, and intermingled with propositions of law and authorities. We are not concerned with the controverted questions of fact, which were finally settled in the Appellate Court, nor with the supposed analyses. The only questions of law before us relate to the sufficiency of the declaration, the liability of a municipal corporation for an injury resulting from the management of water works, and the rulings of the trial court on the admission of evidence.

The first proposition is that the declaration does not state a cause of action. The defendant first demurred to it, and afterward withdrew the demurrer and pleaded "not guilty." The question, therefore, is whether the declaration is good after verdict, and sufficient to support the judgment. There are three counts, none of them well drawn, and all consisting of general charges, in legal phraseology, of duty and negligence, without the averment of specific facts. A dec-

laration should contain a clear and distinct statement of the facts which constitute the cause of action, so they may be understood by the party who is to answer them. A declaration which consists merely of a general charge, and admits of almost any proof to sustain it, is objectionable; and in an action for negligence there must be a definite statement of facts showing in what the negligence complained of consisted. It is not sufficient to allege that there was a duty, but the facts from which the law raises the duty must be alleged; and it is not sufficient to charge a defendant with negligence generally, in failing to comply with the duty. 1 Chitty's Pl., 232; Chicago, Burlington & Quincy Railroad Co. v. Harwood, 90 Ill. 425; Ohio & Mississippi Railroad Co. v. People, 149 Ill. 663, 36 N. E. 989. Each count alleges that the defendant was possessed of a system of water works controlled and operated for its private advantage and emolument, and that it maintained a system of mains, conduits, pipes and fixtures under the street contiguous to the plaintiff's building. The first count alleges that the mains, conduits, pipes, and other appurtenances under the street contiguous to the plaintiff's building were so negligently, defectively, and improperly constructed, used, kept, operated and maintained by defendant that in consequence thereof the break occurred, causing the damage. This count is a wholesale charge of negligence, by which the pleader, without the averment of any fact, condemns the whole original construction when the works were established, and the use, maintenance, and operation ever since. Even the general charge is inconsistent, since a break resulting from faulty construction could not also arise from use, operation or maintenance. The count does not even charge negligence generally in the doing of a specific act, and does not disclose a cause of action. The second count avers that while the defendant's servants, agents, and employees were repairing the mains, conduits, pipes, and appurtenances contiguous to plaintiff's building, the repairs were conducted in such a negligent, unskillful, and inworkmanlike manner that in consequence thereof the

break occurred, causing the damage. A general averment of negligence in doing a particular act is good as against a general demurrer. Chicago City Railway Co. v. Jennings, 157 Ill. 274, 41 N. E. 629. Such a defect is cured by verdict, and the objection is not available upon error. Chicago, Burlington & Quincy Railroad Co. v. Harwood, supra. This count is sufficient to sustain the judgment. The third count avers that it was the duty of defendant to construct use, control, maintain, and operate its water system, and conduits, mains, pipes, and appliances laid under the streets, in a proper and skillful manner, and to maintain a system of inspection, and make such inspection from time to time as would assure reasonable promptness in the detection of imperfections, so that it could take proper means in guarding against damage; that the same were negligently, defectively, and improperly constructed, used, kept, operated, and maintained, and that defendant did not maintain a system of inspection; that there existed a deterioration and damage to the material of the pipes, mains and conduits, and that solely by reason of such imperfection, defect and deterioration, which the defendant neglected to detect, the break occurred, causing the damage. There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible, and, if there were any facts showing the necessity or propriety of such an inspection, they should have been alleged. This count did not state a cause of action. The second count being good after verdict, the judgment cannot be reversed for insufficiency of the declaration, and that is the count which the evidence tended to prove. * * *

(7) SARGENT CO. v. BAUBLIS.
215 Ill. 429; 74 N. E. 455 (1905).

Cartwright, J. Appellee recovered a judgment in the Superior Court of Cook County against appellant for damages on account of the bursting of a grindstone, by which his leg was broken, while he was engaged in the foundry of appellant grinding a "knuckle," which is an appliance, weighing about sixty pounds, for coupling cars. The Appellate Court for the First District affirmed the judgment.

The declaration contains two counts, to which the defendant pleaded the general issue, and on the trial the court instructed the jury that the plaintiff could not recover under the second count. The judgment is based upon the first count, and on this appeal it is contended that no cause of action is therein stated, and that it is insufficient to support the judgment. Several objections are made to the count, and it is apparent that if it had been demurred to the demurrer must have been sustained. But the rule is different when its sufficiency is questioned upon appeal or error. On demurrer a declaration is construed against the pleader, but after verdict all intendments and presumptions are in its favor. If a declaration contains terms sufficiently general to include, by fair and reasonable intendment, any matter necessary to be proved, and without proof of which the jury could not have given the verdict, the want of an express averment of such matter is cured by the verdict. The rule, as often stated, is: "That where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict." 1 Chitty's Pl. 673. "Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general

verdict in his favor, because, 'to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,' and it is therefore 'a fair presumption that they were proved.' But where no cause of action is stated, the omission is not cured by verdict, for as no right of recovery was necessary to be proved, or could have been legally proved under such a declaration, there can be no ground for presuming that it was proved at the trial." Gould's Pl. 463; Chicago & Eastern Illinois Railroad Co. v. Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Chicago & Alton Railroad Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; Baltimore & Ohio Southwestern Rairway Co. v. Keck, 185 Ill. 400, 57 N. E. 197; City of Chicago v. Lonergan, 196 Ill. 518, 63 N. E. 1018. A verdict will aid a defective statement of a cause of action by supplying facts defectively or imperfectly stated or omitted which are within the general terms of the declaration, but, where no cause of action is stated, the omission is not cured by verdict. If, with all the intendments in its favor, the declaration is so defective that it will not sustain a judgment, such defects may be taken advantage of on appeal or error.

The first objection made to the declaration is that it fails to allege facts showing any relation between the parties from which the law would create any duty from the defendant to the plaintiff. The declaration alleges that it was the duty of the defendant to furnish for the plaintiff reasonably safe tools and appliances for use in the work in which he was engaged. The allegation of duty is a conclusion of law which was not traversable without a statement of facts from which the law would raise the duty. A declaration must state such facts as will show that a duty exists. Ayers v. City of Chicago, 111 Ill. 406; Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161; Schueler v. Mueller, 193 Ill. 402, 61 N. E. 1044. In this case the declaration is intended to show the relation of master and servant between the parties, but it contains no express allegation that the plaintiff was in the employ of the defendant or was its servant. The aver-

ments in that respect are that the defendant was in the business of operating a foundry in the city of Chicago, that in said business the plaintiff was employed as a laborer, that the plaintiff was directed by the defendant to use the grindstone in question in the grinding of certain articles called "knuckles," and that plaintiff did as he was directed, and was engaged in the grinding of said knuckles upon said grindstone when he was injured. It is insisted that these averments do not show the relation of master and servant, and it must be conceded that they only do so indirectly. A master is one who has the direction and control of another performing services for him, and, if one is subject to the orders and directions of another in the performance of services and duties, he is a servant. Consolidated Fire Works Co. v. Koehl, 190 Ill. 145, 60 N. E. 87; Grace & Hyde Co. v. Probst, 208 Ill. 147, 70 N. E. 12. We think the averments must be regarded, after verdict, sufficient to show the relation of master and servant and to create the duty alleged.

It is next contended that the declaration is fatally defective in not alleging any actionable negligence. The negligence alleged is that the defendant negligently and carelessly permitted the grindstone to be and remain in a defective and dangerous condition, and there is no statement what defect existed in it, or how or why it was dangerous. This objection to the generality of the statement, without setting out the nature of the allged defect, is one that should have been taken by demurrer and the defect was cured by the verdict. Chicago, Burlington & Quincy Railroad Co. v. Harwood, 90 Ill. 425. The objection to the first count of the declaration in the case of Baltimore & Ohio Southwestern Railway Co. v. Keck, supra, was that it failed to allege in what respect the defendant was negligent, but it was said that the defect, although it might have been fatal on demurrer, was cured by the verdict.

A much more serious defect in the declaration is the failure to allege facts showing that the defendant knew, or ought to have known, of the defect, and a lack of knowl-

edge by the plaintiff. Counsel for the appellee say that they do not question the rule that notice to the defendant and want of knowledge on the part of the plaintiff should be averred, but they contend that such facts were sufficiently stated, and that any omission in that respect was cured by the verdict. In order to recover it was necessary for the plaintiff to establish the three propositions that the appliance was defective, that the defendant had knowledge thereof or ought to have had, and that he did not know of the defect and was not chargeable with knowledge of it. Goldie v. Werner, 151 Ill. 551, 38 N. E. 95; Chicago & Alton Railroad Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; Howe v. Medaris, 183 Ill. 288, 55 N. E. 724; Lake Erie & Western Railroad Co. v. Wilson, 189 Ill. 89, 59 N. E. 573; Armour v. Brazeau, 191 Ill. 117, 60 N. E. 904; Wood on Master and Servant, § 114. A declaration must allege knowledge or facts from which it necessarily appears that the master knew of a defect or a neglect of duty. That was done in Chicago & Eastern Illinois Railroad Co. v. Hines, supra, which is relied upon by appellee. The negligence alleged was the failure to fill the spaces between the ties. The filling of such spaces was an affirmative act, and defendant necessarily knew that it had not done the act. It was not necessary to allege that the master knew that it had not filled the spaces. Where a duty rests on a party, and the duty is not performed, an allegation that it has not been performed necessarily involves notice and knowledge. There may also be cases where an allegation that an unsafe and unfit instrumentality was furnished by the master would necessarily involve knowledge on the part of the nature of such instrumentality. But in this case the averment was not that the defendant furnished a grindstone which was defective and dangerous in the first instance; the allegation was that the defendant negligently permitted the grindstone to be and remain in a defective and dangerous condition; and if it had no actual knowledge, and was not chargeable with knowledge, that the condition of the grindstone had become dangerous or

defective, it would not be liable. There is no averment of that kind. As to the want of knowledge on the part of the plaintiff, it is contended that the averment that he was in the exercise of due care and caution for his own safety was equivalent to an allegation that he had no knowledge of the defective condition of the grindstone. As applied to the assumption of risk by the plaintiff on account of a defective or dangerous condition of the grindstone, the position of counsel is not correct. If the plaintiff knew of a defect in the grindstone, or it was of such a nature that he was chargeable in law with notice of it, he assumed the risk arising from such condition, although he may have exercised the utmost care and caution in using it in such a way that injury would not result to him. Chicago & Eastern Illinois Railroad Co. v. Heerey, 203 Ill. 492, 68 N. E. 74. A servant may assume a risk of a defective appliance with knowledge of the defect and danger, and the fact that he uses care to avoid injury from the defect does not show that he is ignorant of its existence. The objection here considered would have been good on demurrer, but it has several times been held that a failure to aver notice is cured by verdict. In the case of City of East Dubuque v. Burhyte, 173 Ill. 553, 50 N. E. 1077, it was decided that a failure to aver, in the declaration, notice to the city of the defective and dangerous condition of a sidewalk was cured by the verdict. A failure of the declaration to allege notice to the defendant of a defect in a smokestack was held in Boyce v. Tallerman, 183 Ill. 115, 55 N. E. 703, to have been cured by verdict, and in Ide v. Fratcher, 194 Ill. 552, 62 N. E. 814, a declaration which failed to aver that the servant did not know that an emery wheel was cracked and defective was considered sufficient after verdict. Under these authorities it must be held the defect in this declaration was cured by verdict.

It is further urged that causal connection between the negligence alleged and the breaking of the grindstone was not shown by the declaration. The averment was that the plaintiff, in pursuance of the order of the defendant, was

engaged in grinding knuckles upon the grindstone, and while so engaged, and exercising due care and caution for his own safety, the grindstone broke in pieces and fell against him with great force and violence, causing the injury. It was not alleged that the grindstone broke in pieces in consequence or on account of the defect, or what caused it to break, but, under the rule already stated, the declaration must be regarded as sufficient in that respect after verdict. * * *

(8) SCHUELER v. MUELLER.
193 Ill. 402; 61 N. E. 1044 (1901).

Hand, J. This is an action on the case, brought by the appellee against the city of Chicago and the appellants to recover damages for a personal injury claimed to have been sustained by the appellee by falling through a trap door in a sidewalk upon one of the streets in said city. The case was dismissed as to the city, and the appellants, who did not appear, were defaulted, and a jury were sworn, who assessed the damages at $1,720, upon which verdict judgment was rendered. During the same term of court the appellants moved the court to set aside and vacate the judgment, which motion was overruled, and an appeal taken to the Appellate Court for the First District, where the judgment was affirmed, and a further appeal has been prosecuted to this court.

The single question presented to this court for decision is whether the declaration is sufficient to sustain the judgment. It alleges that the city was using, occupying and controlling the street for the passage of the public thereon, and that by reason thereof it became the duty of the city and appellants to exercise ordinary care and caution to maintain the street and the sidewalk in a reasonably safe condition; that in violation of said duty the appellants and the city caused and permitted a certain board sidewalk and trap door therein, then being upon said street in front of the property and premises then and there used and occupied by the appellants, to become broken, displaced, un-

guarded and unsafe, whereby the appellee, while exercising due caution for his own safety, was injured. There is a total failure to state any facts which explain how and why it was the duty of appellants to care for and guard the trap door in the sidewalk, which it is averred was owned and controlled by the city. The averments contained in the declaration as to the duty of appellants are mere conclusions of law, which are not traversable. It is not sufficient in a declaration to allege generally the duty of the defendant; but the pleader must state facts from which the law will raise a duty, and show an omission of the duty and a resulting injury. Ayers v. City of Chicago, 111 Ill. 406; Railroad Co. v. Hawthorn, 147 Ill. 226, 35 N. E. 534; Railroad Co. v. Clausen, 173 Ill. 100, 50 N. E. 680. The declaration was therefore substantially defective.

A default admits only what is averred in the declaration, and, if the facts alleged do not give a right of recovery, final judgment should not be entered against the defendant. Bragg v. City of Chicago, 73 Ill. 152; Lawver v. Langhans, 85 Ill. 138; Board v. Smith, 95 Ill. 328. The defects in the declaration were not cured by the statute of amendments and jeofails. "The statute of amendments and jeofails does not extend to cure defects which are clearly matters of substance." Railroad Co. v. Clausen, supra. Nor were they cured by the verdict. Where the declaration, and the issues joined upon it, do not fairly impose the duty on the plaintiff to prove the omitted fact, the omission will not be cured by verdict, as "nothing will be presumed after verdict but what must have been necessarily proved under the averments of the declaration." Steel Co. v. Shields, 134 Ill. 209, 25 N. E. 569. In this case the judgment was by default, and no evidence was required upon the question of duty of appellants to care for and guard the trap door in the sidewalk, which was owned and controlled by the city. Bragg v. City of Chicago, supra. In Wright v. Bennett, 3 Scam. 258, an action of debt was brought to recover under the statute for cutting timber. The declaration failed to allege that the plaintiff was the owner of

the premises in fee simple. A default was entered, and a jury sworn, who assessed the plaintiff's damages. The court say (page 259): "The declaration, being substantially defective, was not aided by the verdict, and the motion in arrest of judgment should have been sustained."

We are of the opinion the court erred in overruling the motion of the appellants to set aside and vacate said judgment. The judgments of the Superior and Appellate courts will therefore be reversed, and the cause remanded to the Superior Court for further action in accordance with the views herein expressed.

Reversed and remanded.

(9) CHICAGO CITY RY. CO. v. JENNINGS.

157 Ill. 274; 41 N. E. 629 (1895).

Magruder, J. This is an action brought by appellee, M. C. Jennings, against the Chicago City Railway Company, appellant, to recover damages for injuries to appellee's phaeton or buggy caused by a collision between it and a train of appellant's cars. The declaration avers: "Plaintiff was riding in a certain carriage, commonly known as a 'Goddard phaeton,' then and there drawn by a certain horse upon and along the said street — Cottage Grove avenue. And the defendant was then and there possessed of a certain motor or grip car, used by said defendant to propel certain passenger cars, known as 'street cars,' along and on said Cottage Grove avenue, by means of a wire rope or endless cable, and the said motor car had then and there attached thereto certain of said passenger cars, and which motor and train of said cars were then and there under the care and management of drivers, then servants of the defendant, who were then and there driving the same upon and along the said street, Cottage Grove avenue, near to or about where said Cottage Grove avenue intersects or meets Seventieth street of said city, as aforesaid, and while plaintiff, with all due care and diligence, was then and there riding in the said carriage along and on the said

Cottage Grove avenue, at or near to where the latter meets Seventieth street, as aforesaid, upon the said public highway there, the defendant then and there, by its said servants, so carelessly and improperly drove and managed the said motor and train of cars that, by and through the negligence and improper conduct of the defendant, by its said servants in that behalf, the said motor and train of cars then and there ran into and struck with great force and violence upon and against the said carriage, and did by said force and violence then and there crush and destroy the said carriage, and rendered the same of no value whatever to plaintiff." To this declaration a general and special demurrer was filed; grounds of special demurrer being that the allegation that the defendant carelessly and improperly drove and managed its train of cars is vague, uncertain, and indefinite, and fails to inform defendant wherein the negligence complained of consisted, and also that said declaration fails to set forth whether the plaintiff was driving personally, or whether his servant had charge of the carriage in question, and, if the said carriage was driven by a servant, whether the servant was free from negligence. The court overruled the demurrer, the defendant electing to stand by it. There was judgment by default for $160, and an appeal to the Appellate Court, which rendered a judgment affirming the ruling of the court below. The Appellate Court granted a certificate of importance, and the case is here by appeal from the judgment of affirmance rendered by that court.

The charge which the special demurrer makes against the declaration is that of vagueness, uncertainty, indefiniteness, and failure to state wherein the negligence complained of consisted. We are inclined to think that the declaration is not justly subject to the criticism made upon it, and that, therefore, the trial court properly overruled the special demurrer to it. "A general statement of facts, which admits of almost any proof to sustain it, is objectionable." 1 Chit. Pl., p. 232. "Facts only are to be stated and not arguments or inferences." Id. p. 213. But, in

alleging a fact, "it is unnecessary to state such circumstances as merely tend to prove the truth of it." Id. p. 225. In other words, it is not only a rule of pleading that the statement of facts must not be so general as to admit of almost any proof to sustain it, but it is also a "familiar rule of pleading which forbids alleging the evidence." The two rules should be harmonized, and the two extremes which they respectively define should be avoided. Railroad Co. v. Dunlap, 29 Ind. 426. The facts must be set forth with certainty; that is to say, there must be "a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment." 1 Chit. Pl., p. 233.

We think that the declaration in the case at bar sufficiently fulfills the requirements of the definitions thus given. The declaration alleges that the defendant was possessed of a motor or grip car, which had passenger or street cars attached to it; that it used this grip car to propel the passenger cars along the street or avenue by means of a wire rope or endless cable; that the motor or grip and cars were under the care and management of drivers, servants of the defendant, who were driving the same upon the street near to the place where it intersected another street; that the defendant, by its said servants, so carelessly and improperly drove and managed the motor and train that, by the negligence and improper conduct of the defendant, by its said servants, the motor and train ran into the carriage of the plaintiff while the latter was riding with due care along the public highway near the intersection of the two streets. It is well known that the grip car is propelled, not only by the action of the driver on the car, who has his hand upon the grip, but also by the operation of the machinery with which the cable is connected at a distant part of the line. It was the duty of the Company to see to it that these appliances were reasonably safe, and that they were under the management of competent servants. The

driver of the car should have the mechanical power propelling it under his control, and should so exercise this control as to avoid injury, if possible. The company has not the exclusive right to the use of the public streets, but only to the use of them jointly with the balance of the public, and therefore its servants must take notice of the numbers of travelers liable to be on the streets at street crossings, and must exercise the care demanded by the increased danger at such points. Booth, St. Ry. Law, §§ 304-307; 23 Am. & Eng. Enc. Law, pp. 1019-1024. The declaration specifically charges, as the act of negligence for which the company was responsible, that the servants or drivers placed in control of the propelling power which moved the cars managed and drove the same carelessly and improperly, and that the collision at the crossing was due to their negligence "and improper conduct." Where a declaration charges that the employes of a railroad company carelessly and negligently run its train of cars over its road, it sufficiently states an act upon which the charge of negligence and carelessness is predicated. Railroad Co. v. Chester, 57 Ind. 297. The approved forms in the books of precedents seem to justify some generality in the averment of negligence; that is to say, they do not require an allegation of all the particular facts constituting the negligence. Railroad Co. v. Dunlap, supra. Although Chitty, in the first volume of his work on Pleading, deprecates a statement of facts which is too general in its character, yet, in the second volume, he prescribes a form of declaration which has been followed almost literally by the appellee in framing the declaration in the case at bar. 2 Chit. Pl., pp. 710, 711. The declaration of appellee not only conforms to the precedent in Chitty, but also to the precedents set forth in the following books: Yates, Pl., p. 396; 1 Har. Ent., p. 351; 2 Humph. Prec. 807, 808; 8 Went. Pl., p. 396.

Counsel say that the precedents referred to are cases where, in collisions between carriages on the highway, or between boats on the water, the driver of the horses fails to drive and manage them properly, or the pilot of the boat

fails to steer it properly, but that such precedents have no application to the cars of a street-railroad company, which move upon fixed rails and within a prescribed track, so as to be unable to get out of the way by moving to the right or left. We do not regard the distinction as well founded. The driver of the grip-car must be governed by established rules. He must know how to manage the motor. He must not drive it at an unreasonable rate of speed He must keep a reasonably careful lookout ahead. He must respect the equal rights of others to the use of the public streets. How can the pleader know exactly what caused the failure of the company's servants to properly drive and manage the motor car? How can he know whether such failure resulted from the non-observance of one rule, or of another, or of all the rules? The failure may have been due to ignorance, or accident, or want of attention, or to some other cause known only to the company and its servants. It is a well settled rule that the pleader is required to set out the particular facts constituting the negligence complained of, only so far as they appear to be properly within his knowledge. Young v. Lynch, 66 Wis. 514, 29 N. W. 224, 5 Am. & Eng. Enc. of Law, p. 351; Railroad Co. v. Van Horn, 38 N. J. Law, 133. If the particularity demanded should be required in a case like the one at bar, then the precedents referred to, instead of charging generally that the driver of the horse carelessly and improperly drove and managed him, or that the pilot of the vessel improperly managed or steered it, should set out particularly whether the driver of the horse pulled the wrong rein or not, and, if he did, whether he did it through accident or ignorance of the art of driving, or whether the pilot of the ship turned the wheel of the rudder the wrong way or not, and, if he did, whether it was done by accident or through ignorance of the art of navigation. No such particularity is demanded. Where the act upon which the negligence is predicated is of a simple character, an allegation of an absence of care in its performance becomes reasonably intelligible, and hence it is not necessary to specify

particularly the circumstances. For example, in the form in 2 Chit. Pl. 711, it is averred that the defendant's boat, by his "carelessness, mismanagement and want of care," struck plaintiff's vessel; and by this averment the defendant was sufficiently advised to be able to understand the case to be made against him. So, in a suit against a railroad company for causing the death of the intestate by carelessly and negligently running over him with a locomotive, the general averment that "the defendant, by her agents and servants, did carelessly and negligently run over," etc., was held to be sufficient, without stating the particular acts constituting such negligence. Railroad Co. v. Keely's Adm'r, 23 Ind. 133; Railroad Co. v. Van Horn, supra. In Clark v. Railway Co., 28 Minn. 69, 9 N. W. 75, which was an action for damages, the complaint alleged that the defendant "by the culpable carelessness, negligence, unskillfulness and mismanagement of said defendants and their employes, wrongfully ran a locomotive, with a train of cars thereto attached," against plaintiff's horse and wagon, while lawfully traveling along the public highway; and it was there held that, on demurrer, the complaint was sufficient, although it did not state the specific physical acts constituting the alleged negligence and carelessness. In the Minnesota case last referred to, which contains an able discussion of the subject, it is, among other things, said: "Therefore, it has been generally settled by precedent and authority that a general allegation of negligence or carelessness, as applied to the act of a party, is not a mere conclusion of law, but is a statement of an ultimate fact allowed to be pleaded. Such a general form of pleading negligence seems to have been permissible in common-law pleading." In Hawker v. Railroad Co., 15 W. Va. 628, the action was against a railroad company for negligently and wrongfully killing the plaintiff's cattle on its track. The declaration alleged that "the defendant negligently, carelessly and wrongfully caused a train of cars on its railroad to be propelled and driven upon the fat cattle of the plaintiff, whereby three of them were killed, and seven others greatly bruised and in-

jured," and it was held that this allegation was sufficiently certain to meet the requirements of pleading, the court saying: "There was no necessity for the declaration to specify the acts of omission or commission which constituted the negligence of the defendant which is the basis of the action. * * * It is neither usual nor necessary to specify the acts or omissions of the defendant which constitute the negligence. This is a matter of proof, and need not be specified in the declaration." See, also, Berns v. Coal Co., 27 W. Va. 285; 5 Am. & Eng. Enc. of Law, p. 351, note 4; Railway Co. v. Hixon, 110 Ind. 225, 11 N. E. 285. In Fits v. Waldeck, 51 Wis. 567, 8 N. W. 363, where the complaint in the action charged that the negligence of defendant's engineer caused the death of plaintiff's intestate, but did not state the precise act or omission which caused the boiler to explode, it was held that an averment "that the engineer so recklessly, negligently and unskillfully managed the engine and boilers that one of the boilers exploded, and the intestate was thereby killed," was sufficient on demurrer; and it was also there said, that the plaintiff had only general knowledge or information on the subject, and made the averment as specific as he could.

It is claimed, however, that two decisions of this court sustain the contention here made, that the declaration is insufficient upon special demurrer. One of these is Railroad Co. v. Harwood, 90 Ill. 425, and the other is Ohio & M. Ry. Co. v. People, 149 Ill. 663, 36 N. E. 989. In the Harwood case there were two counts in the declaration, and the general issue was pleaded to the whole declaration, so that the question here involved did not arise upon a demurrer to the declaration, and the remarks there made with reference to objections to the admissibility of proof, on the ground of variance from the cause of action set forth in the declaration, were not necessary to a decision of the case. As a plea was filed to the declaration, its sufficiency was thereby admitted, and the question whether the declaration would have been sufficient if it had been specially demurred to was not in the case. Independently, however, of

this consideration, it will be found, upon a comparison of the declaration in the Harwood case with that in the case at bar, that, while some of the phraseology is the same in both, yet they are materially different. The declaration here is much fuller in its allegations, and charges the collision directly to the carelessness and mismanagement of servants who were driving and managing the grip-car, while there the charge in the declaration, as quoted in the opinion, is made against the company generally, without reference to the conduct of the servants employed by it. Moreover, in the Harwood case, the defendant was a steam-railroad company, subject to special statutory regulations, a violation of which must be specially averred in the declaration. Woodward v. Navigation Co., 18 Or. 289, 22 Pac. 1076. The other case of Ohio & M. Ry. Co. v. People, supra, has no application here. That was an action of debt, to recover a penalty for a failure or neglect to ring a bell or sound a whistle for a distance of at least eighty rods from a road crossing. There were four counts in the declaration, for four specific violations of the statute, and the declaration was held to be defective on special demurrer because it did not describe the engines nor trains referred to, and failed to show whether they were freight or passenger trains, or the time when the engines or trains passed over the crossing, or in what direction they were running. The action there was not for negligence, and consequently there could be no question as to whether an averment of negligence was too general or not.

The other ground of special demurrer, that the declaration fails to state whether the plaintiff was driving personally, or whether his servant had charge of the carriage, is without force. The declaration says: "While the plaintiff, with all due care and dilligence, was then and there riding in the said carriage," etc. We regard this form of allegation as sufficient. The judgment of the Appellate Court is affirmed.

(10) CHICAGO W. D. RY. CO. v. INGRAHAM.

131 Ill. 659; 23 N. E. 350 (1890).

Shope, C. J. This was an action on the case by appellee, to recover damages to his person and property claimed to have been sustained through the negligence of appellant's servants, whereby a collision occurred between a car on appellant's railway and the buggy in which the appellee was riding. The declaration contained a single count. It alleged, in apt form, that appellee was riding on West Twelfth street, in Chicago, in a buggy drawn by a single horse; and, while in the exercise of due care and caution on his part, the servants of defendant, appellant, so carelessly and negligently drove and managed the horses by which a street-car upon defendant's tracks was drawn that the car struck the buggy of appellee with great force, whereby he was thrown to and upon the ground, and severely and permanently injured, his buggy and harness broken, injured, and damaged, and his horse hurt, damaged, and permanently deteriorated in value. The count, by apt averments, sets out the personal injury to appellee, his expense in being cured, and loss of time, and also the damage to his horse, buggy and harness, and seeks recovery of damages to his person and property. To this declaration the appellant filed the general issue. A trial resulted in a verdict and judgment thereon for appellee of $1,000. On appeal to the Appellate Court, the judgment was affirmed; and the railway company prosecutes this further appeal. All controverted questions of fact necessary to sustain the judgment are necessarily determined against appellant by the judgment of the Appellate Court.

It is insisted that the trial court erred both in giving instructions and in the admission of evidence. The criticism of the second instruction given on behalf of appellee is that the jury were thereby instructed that, if they found for the plaintiff, then, in assessing his damages, they should take into consideration any damage shown to have resulted to the person of the plaintiff. and also to his personal prop-

erty, the point made being that the damages to the person of the plaintiff, and the damages to his horse, buggy and harness, were separate and distinct injuries, and hence could not be recovered for under a single count declaring for both. We are referred to Brunsden v. Humphrey, L. R. 14 Q. B. Div. 141, as sustaining that view. The case, when properly considered, if it be accepted as a true exposition of the law, is not controlling. In that case the plaintiff recovered judgment for an injury to his cab caused by a collision with defendant's van, through the negligence of defendant's servants, and subsequently sued the same defendant for personal injury to himself alleged to have resulted from the same collision; and it was held that the former suit was not a bar to the second recovery. It is conceded, as indeed it must be, that recovery for damages to the person and to the property of appellee might be had in the same action, if declared for in separate counts of the declaration. The general rule of the common law is that where several causes of action of the same nature, that is, which require at the common law the same judgment, and are recoverable in the same form of action, exist between the same parties, in the same right, they may all be joined, by several counts, in one declaration. Gould, Pl., c. 4, §§ 79, 85, 103; Chit. Pl. 228. And this would be so notwithstanding they might be so far several and distinct rights of action that a judgment for one would be no bar to a recovery for the other. And, if it be conceded that the injury to the person and to the property of appellee so far constituted distinct causes of action that separate suits might be maintained therefor, we are unable to perceive any reason, where the damages result in the same manner, and from the same negligent or willful act of the defendant, and are coincident in time, and the cause of action accrues to the plaintiff in the same right, and against the defendant in the same character or capacity, they may not be joined in the same count of the declaration. Godfrey v. Buckmaster, 1. Scam. 447. At most it would be violative only of the rule in respect of duplicity in pleading, but which, in

the state of pleadings here, it will be unnecessary to determine. The declaration counts upon the injury to both the person and property of the plaintiff. The damages alleged to have been sustained to each are alleged with equal particularity; and it can no more be said that the suit is to recover damages resulting from his personal injuries than that it is for the recovery of damages to his horse, buggy and harness. A substantive right of recovery is by the declaration based upon the injury to each—to the injury to his property no less than to his person. Duplicity in a declaration consists in joining in one and the same count different grounds of action, of different natures, or of the same nature, to enforce only a single right of recovery. Gould, Pl., c. 4, § 99. It must be manifest that the declaration here considered does not fall within this definition of duplicity given by Mr. Gould. But, be this as it may, and conceding that it is faulty for duplicity, this is a fault in pleading only, because it tends to useless prolixity and confusion, and is therefore only a fault in form. Id. Ordinarily, this defect in pleading, being of form only, can be taken advantage of only by special demurrer for that cause. Chit. Pl. 228. The defendant, having filed the general issue, waived this formal defect, and tendered issue upon the material averments of the declaration. Therefore, if the plaintiff sustained his declaration by proof, his right of recovery would be as complete as if the two causes of action had been stated in different counts. It follows that, as the plaintiff had, under his declaration, a right to recover both for injury to his person and to his property, the court committed no error in so instructing the jury. This seems to have been the view of the learned counsel for appellant at the trial, for no demurrer was filed, and the evidence in respect of the damages was admitted without objection; and we are of opinion they have no just cause of complaint in regard to this instruction. * * *

(11) CHICAGO CITY RY. CO. v. BARKER.
209 Ill. 325 (1904).

[Case for personal injuries. Opinion by Mr. Justice Magruder.]

* * * This is a case for the application of the rule res ipsa loquitur. While Eick [appellee's decedent, who died during the pendency of the appeal] was riding west in his wagon upon the north side of the street, as he had a right to do, an electric motor car belonging to and under the management of appellant, and used for sprinkling purposes, with no motorman, or any other person, upon it, or in control of it ran up from the rear and struck Eick's wagon, and threw him out upon the ground, and inflicted the injuries for which this suit is brought. This collision gives rise to a presumption of negligence on the part of the appellant, and the burden of proof was upon the appellant to rebut that presumption.

* * * * * * *

It is said, however, on the part of the appellant that the declaration in this case charged specific acts of negligence, and that therefore, Eick was not entitled to rely upon presumptive negligence. The cases of West Chicago Street Railroad Co. v. Martin, 154 Ill. 523, and Chicago and Eastern Illinois Railroad Co. v. Driscoll, 176 id. 330, are relied upon in support of this position. But the facts of the latter cases, when carefully examined, will show that they have no application to the case at bar. The declaration here charges that the appellant "carelessly, negligently and wrongfully ran and managed its car." If the appellant placed the sprinkling car under the control of a motorman, who lost control of it by his own carelessness, then the sprinkling car was not properly run and managed by the appellant. We think that the declaration is sufficiently general in its terms to take the case at bar out of the rule, announced in the cases last referred to. The second count of the declaration does not state in or by what specific acts the carelessness in driving or managing the car was manifested, whether by running at a greater rate of speed than

safety or prudence required, or by improper and insufficient exercise of control on the part of the motorman or by some other means. "Carelessness and impropriety are not descriptive of specific acts, but of a class of acts only, which may include an idefinite number of specific acts, each differing in its character from the others." (Chicago Burlington and Quincy Railroad Co. v. Harwood, 90 Ill. 425.) * * *

(12) HENRIETTA COAL CO. v. CAMPBELL.
211 Ill. 227 (1904).

[Case for personal injuries by a driver in a mine against his em ployer. Opinion by Mr. Chief Justice Ricks.]

* * * It is insisted by appellant that inasmuch as the declaration did not aver a specific order or direction of appellant to appellee [to do the particular thing which resulted in his injury], it was, therefore, error to permit the introduction of evidence tending to show the same. The declaration does allege, however, that the appellee was in the exercise of due care for his own safety, and we perceive no error in permitting proof of all the circumstances tending to support that allegation, and it was competent, under that allegation, for the appellee to show, if he could, that he was ordered or directed to do the work he was attempting to do and in the manner in which he was endeavoring to do it, and then it was for the jury to say whether, under such circumstances, appellee acted recklessly or otherwise. * * *

(13) HIMROD COAL CO. v. CLARK.
197 Ill. 514; 64 N. E. 282.

This is a suit, brought in the name of the administrator, for the benefit of the widow and next of kin, for the alleged wrongful neglect of appellant to keep the roof of the entry or roadway in its mine near a certain room 11 therein in a reasonably safe condition, by propping the same, or otherwise making it secure for the employes to work under it.

The new declaration, which was filed on October 15, 1900, alleges that the appellant was the owner and operator of a coal mine, which it operated by means of a shaft, roadways, entries and servants, and that it had knowledge of the lack of props and cap pieces, and of the consequent dangerous condition of the mine, or, by the exercise of ordinary care, might have known thereof. The accident occurred on May 25, 1899. The declaration alleges that the deceased, Christ Schroath, was employed in rooms on said entry as a machine runner, and while he was so employed near room 11, and while he was in the exercise of due care, a portion of the roof of the entry gave way and fell on him, so injuring him that he afterwards died. On January 24, 1900, appellant filed a demurrer to the declaration, which was overruled, and thereupon, on March 14, 1901, appellant filed a plea of not guilty. Upon the trial of the case the issues were found in favor of the appellee, and judgment was rendered upon the verdict. The appellant took an appeal to the Appellate Court, where the judgment was affirmed. The present appeal is prosecuted from such judgment of affirmance.

Magruder, C. J.—1. The first contention of the appellant is that the declaration fails to state a cause of action. The declaration is alleged to be framed upon the theory that it was the duty of the appellant to prop the roof of its mine or of the entries therein, whereas it is claimed that no such duty is imposed by the common law or by the statute. Appellant first demurred to the declaration, and, its demurrer being overruled, filed the plea of the general issue. By thus pleading it waived any objection to the declaration, unless the declaration is so defective that it will not sustain the judgment. Here the appellant made a motion in arrest of judgment, which motion was overruled, and exception was taken to the overruling thereof. If the declaration is so defective that it will not sustain the judgment, such defect may be taken advantage of on motion in arrest of judgment or on error. Kipp v. Lichtenstein, 79 Ill. 358. We are of the opinion that the defect

charged against the declaration is not so serious that the declaration will not sustain the judgment. The declaration alleges, in substance, that the appellant company negligently failed to keep its entry or roadway in a reasonably safe condition at the place where the accident occurred. The law is well settled that it is the duty of the master to use reasonable care to furnish his servants with a reasonably safe place for the performance of their work. This is a positive obligation resting upon the master, and he is liable for the negligent performance of such duty, whether he undertakes its performance personally or through another person. Leonard v. Kinnare, 174 Ill. 532, 51 N. E. 688; Railroad Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; Hess v. Rosenthal, 160 Ill. 621, 43 N. E. 743. The negligence set up is negligence at common law. The allegation in the declaration as to a failure to place props or crosspieces is merely a statement of one of the reasons why the place where the deceased was working was not safe. The allegation that the entry or roadway of the mine was not kept in a reasonably safe condition was none the less effective, as a common-law allegation, because there was a specification of one particular in which such entry or roadway was unsafe, namely, the absence of props or crosspieces to support the roof. Although the averments of the declaration may be awkwardly expressed, yet the objection thus made to it is not of such a character that it can now be raised, after the appellant has filed a plea and gone to trial upon the merits. * * *

(14) C. B. & Q. R. R. CO. v. MAGEE.

60 Ill. 529 (1871).

[Opinion by Mr. Chief Justice Lawrence.]

This was an action brought by the appellee to recover the value of a horse killed by one of defendant's trains. The declaration has but one count, and in that plaintiff avers a failure to build and maintain a sufficient fence, as required by the statute, and also avers that the defendant so care-

lessly ran, conducted and directed its train that it struck and killed the plaintiff's horse.

On the trial the plaintiff was permitted to introduce evidence tending to prove both the grounds of liability alleged in his declaration; and the court instructed, a recovery could be had upon either ground if the proof was sufficient. It is now insisted this was error. The objection, however, is not well taken.

The declaration was liable to a demurrer for duplicity in uniting in one count two causes of action. But the defendant pleaded the general issue, and on the trial of the issue thus made, the plaintiff was entitled to prove either of the causes of action alleged in his declaration. * * *

(15) CHICAGO CITY RY. CO. v. O'DONNELL.
207 Ill. 478; 69 N. E. 882 (1904).

Cartwright, J. This is an action on the case instituted by appellee, as administrator of the estate of Michael B. Rowen, deceased, in the Superior Court of Cook County, to recover damages for the death of said Michael B. Rowen, who was run over and killed by one of appellant's cars. The declaration alleged that his death was caused by willful and wanton conduct on the part of servants of appellant. The plea was the general issue, and a trial resulted in a verdict of $5,000 for appellee. Upon the argument of a motion for a new trial, appellee remitted $1,500, and the court overruled the motion and entered judgment for $3,500 and costs. The Appellate Court for the First District affirmed the judgment.

At the conclusion of the evidence in the case, defendant entered a motion to instruct the jury to find it not guilty, and the motion was denied. The declaration contained three counts, but a demurrer was sustained to the first count, and the case went to trial on the second and third. The second count alleged that Michael B. Rowen was a minor, aged nine years, and was lying in a helpless condition on the defendant's track in the city of Chicago; that,

by the exercise of ordinary care on the part of defendant's servants in charge of one of its cars, his presence could have been discovered and the car could have been stopped before running over him, but that defendant's servants recklessly, negligently and improperly ran the car over him and killed him. The third count alleged that the defendant operated double tracks running east and west on Root street, in said city; that Michael B. Rowen was riding, but not as a passenger, on one of defendant's cars, which was running east at such a high rate of speed as to make it dangerous for a person to alight therefrom; that the conductor in charge of said car willfully, wantonly, and recklessly, by ordering Rowen to get off the car, and by a threatening and menacing attitude toward him, and by attempting to strike and grab him, compelled him to jump from the car, and, in doing so, he was thrown and fell with great force on the track for west-bound cars, so as to render him helpless; that, while so lying in a helpless condition, defendant was running another car west, and the servants of defendant in charge of the same, by the exercise of ordinary care, could have discovered him lying on the track, but that they wantonly, recklessly, and negligently ran the car over him and killed him.

There was no evidence tending to sustain the second count. The accident occurred in the evening of January 5, 1900, after dark; and the evidence showed, without contradiction, that the motorman in charge of the west-bound car had no knowledge that any one was lying upon the track, nor any reason to suspect that such was the case, until he received a warning, and that he made every possible effort to stop the car and prevent the accident. There was entire failure to prove either willful, wanton or negligent conduct on the part of any one in charge of that car. The only witness tending to sustain a cause of action related to the alleged actions of the conductor of the east-bound car, under the charge made in the third count. There were double tracks in Root street; the east-bound cars using the south track, and the west-bound the north track.

Passengers were not allowed to get on or off the cars from the side next to the adjoining track, and the cars were equipped with iron gates on that side to keep passengers from getting on or off. When the east-bound car reached the Ft. Wayne tracks, the conductor got off, and preceded the car across the railroad tracks, and then got on at the front end of the car, coming through and collecting fares. As the car was so crossing the Ft. Wayne tracks, Michael B. Rowen, who was a newsboy, nine years old, got on the lower step next to the track for west-bound cars, outside the iron gate. He had some newspapers under his arm, and held on to the irons by his hands. A young man named Garfield Andrews stood inside the gate in front of Rowen to conceal him from the sight of the conductor. The conductor, having passed through the car to the rear, came out on the middle of the platform; and Rowen either whistled, or Andrews spoke to him, which attracted the attention of the conductor, and he asked Andrews who was behind him. Andrews stepped to one side, and the conductor saw the boy. The liability of the defendant depends upon what the conductor then did, and that, with the speed of the car, is the only disputed fact in the case. There were but two persons who knew anything about it—one being Garfield Andrews, and the other John Nelson, the conductor—and they contradicted each other. Andrews testified that the conductor told the boy to get off, and raised his arm in a threatening attitude and moved toward him; that the witness told the conductor the car was going too fast; and that when the conductor told the boy to get off and moved toward him in threatening manner, the boy let go and jumped off. The conductor testified that when Andrews moved aside, and he saw the boy hanging on the hand rail next the gate, the witness said, "What are you doing there?" that Andrews said "Oh, let him ride;" that the boy leaned forward as though he were going to let go or fall off, and the witness said, "Hold on there;" and that at the same moment the boy swung aside and jumped off. The evidence for the plaintiff tended to show that the car

was going eighteen or twenty miles an hour, and the evidence for the defendant was that it was going seven or eight miles an hour. The conductor testified that he did not want the boy to get off at that time; that he did not know him, or attempt to make him get off, and that he would not want the boy to jump off, going at the rate of speed the car was moving, because he would be likely to fall and be hurt. When the boy swung off, his feet went out from under him, and he tripped or fell across the other track. A car was coming from the other way, and Andrews jumped off and ran toward the other car, holding up his hand and shouting. The conductor rang his bell for an emergency stop, and then jumped off too. As the cars approached each other, the gongs of both were sounded. Andrews and the conductor both shouted to the motorman of the westbound car, and did everything they could to stop it; and, when the motorman saw and heard the warnings, he did everything he could to stop.

The boy was not a passenger, and had no intention of paying fare, but was trying to get a ride by standing on the lower step and hanging onto the iron outside of the gate, where passengers were not received or allowed to enter the car. The defendant was not bound to exercise toward him the care owing to a passenger, but it was bound to not wantonly or willfully inflict injury upon him. The testimony of Andrews tended to prove a willful and wanton injury, and required the submission of the issue to the jury. It seems to be conceded that his testimony did tend to prove such an injury, but it is insisted that the testimony of the conductor was the more probable, and that the circumstances of the case should have convinced the court and the jury of its truth. That was a question for the Appellate Court, which is no longer open to inquiry. Cars were passing very frequently on the adjoining track, and the tracks were so close together that passengers were not allowed to enter or leave the car on the side next to the other track, doubtless because of the danger. If the testimony of Andrews concerning the action of the conductor was believed,

the circumstances tended to show that the accident was a natural and probable consequence of the wrongful act, and such as a person of ordinary prudence ought to have foreseen would be likely to result.

It is also assigned as error that the court gave, at the request of plaintiff, the following instruction: "The court instructs the jury that if you believe from the evidence that defendant's east-bound car, at the time and place in question, was running at such a high rate of speed as to be dangerous for deceased, or any ordinary person so situated, to jump from said car, and that said conductor, while acting within the scope of his authority as such conductor, if he was so acting, willfully and wantonly compelled deceased to jump from said car in manner and form as charged in the declaration, if he did do so, and while it was running at such rate of speed, and that said conductor's conduct in this regard showed a reckless disregard of deceased's safety, and that deceased was thereby thrown down on the adjoining track and rendered helpless, and while so lying upon said track was run over and killed by the west-bound car before it could be stopped, then you should find the defendant guilty, even though you should find from the evidence that there was no fault upon the part of the motorman of the west-bound car." The rule of law stated in the instruction is correct. If the conductor of the east-bound car was guilty of a willful and wanton act which was the efficient cause of the deceased falling upon the track and lying there in a helpless condition, where he would naturally be in danger of being run over and killed by west-bound cars, the plaintiff could recover, althought the injury actually resulted without fault of those in charge of the west-bound car. Cooley on Torts, 70. The objection to the instruction is based on the form of the pleadings. The instruction could only apply to the third count, which charged wanton and willful conduct on the part of both the conductor of the east-bound car and the motorman of the west-bound car; and it is contended that, in order to justify a recovery, it is necessary to prove both charges;

that the count stated but one cause of action, based upon two acts jointly committed by the conductor of one car and the motorman of another, from which the injury resulted; that the proximate cause of the injury was alleged to be the reckless and wanton negligence of the motorman of the west-bound car, and not the act of the conductor in driving the deceased from the east-bound car; and that the instruction was bad in permitting a recovery where the evidence showed that there was no fault on the part of the motorman of the west-bound car. It is a settled rule that a plaintiff must recover, if at all, on the case stated in his declaration. He cannot make one case by allegation, and recover on another case made by the proof; but in this case there was an attempt to state in the declaration two independent wrongful acts, either of which would justify a recovery, and the question is whether the plaintiff was bound to prove both. If the deceased was lying in a helpless condition on the track, and the motorman of the west-bound car, by the exercise of ordinary care, could have discovered him, but wantonly, recklessly, and negligently ran the car over him and killed him, the plaintiff could recover, regardless of the question how the deceased came to be on the track. On the other hand, if the deceased was on the track in a helpless condition through the willful and wanton act of the conductor of the east-bound car, plaintiff could recover, regardless of the question whether the act of the motorman was wrongful or innocent. No objection was made to the count, and, if there was a fault in it, it consisted in the violation of the rule that each count must state a single cause of action, and must not state different facts or sets of facts, any one of which would justify a recovery. That objection is to be raised and pointed out by special demurrer. The alleged acts of the conductor and motorman were not joint or concurrent. Neither was the nature of the act of the motorman, as willful or otherwise, a matter of essential description of the injury, which must be proved as laid. We think that the charges were divisible, and the rule is that, in actions for torts, plaintiff may prove

a part of his charge, if there be enough proved to sustain his charge. Chicago & Grand Trunk Railway Co. v. Spurney, 197 Ill. 471, 64 N. E. 302. There was therefore no error in giving the instruction.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(16) I. C. R. R. CO. v. ASHLINE.
171 Ill. 315 (1898).

[Case. Opinion by Mr. Justice Craig.]

* * * On the trial the plaintiff offered in evidence an ordinance of the city of Kankakee, prohibiting a passenger train from running at a greater speed within the incorporated limits of the city than ten miles an hour. The ordinance was objected to because it was not admissible under the pleadings. The declaration contains six counts, but no attempt was made to plead the ordinance in any of the counts except the third. In that count it is averred that while Ashline, with all due care and caution, was walking across said railroad track at the crossing upon a public street and highway, "the defendant then and there, by its servants so carelessly and improperly driving and managing the train, was carelessly and knowingly running said locomotive engine and train at a great speed within the incorporated limits of said city of Kankakee, to wit, at a speed of twenty miles per hour and upwards, over and across said public street crossing, and in violation of the ordinance of said city in such case made and provided (approved March 27, 1888, chap. 9 sec. 3), said locomotive engine and train then and there ran and struck with great force and violence when running at aforesaid speed in violation of said ordinance, and said Ashline was then and thereby killed."

Courts do not take judicial notice of an ordinance of an incorporated town or city, or a private statute or the statute of a foreign state, and hence, when they may be material in an action or in the defense of an action, they must be specially pleaded. Here the ordinance was pleaded,

but it is said it was not sufficiently pleaded. We think counsel is correct in his position that the ordinance was not sufficiently set out in the declaration. The pleader was not required to set out the ordinance in haec verba, but he was required at least to set out the substance of the ordinance. (Louisville, New Albany and Chicago Railway Co. v. Shires, 108 Ill. 619.) That part of the ordinance relied upon, or all the substantial parts of the ordinance, should be set out, so that the requirements of the ordinance may be seen and known. But while we do not think the ordinance was sufficiently pleaded, we do not think appellant could take advantage of the defect in the pleading when the ordinance was offered in evidence. If the declaration was bad, appellant might have reached the defect by demurrer; but this it did not do. Having failed to demur, the objection to the declaration will be regarded as waived. If no attempt whatever had been made to plead the ordinance, the objection to its admission in evidence would have been well taken; but when an ordinance is pleaded, although in a defective manner, the court, on the trial, may properly admit it in evidence. * * *

(17) CHRISTIANSEN v. GRAVER TANK WORKS.

223 Ill. 142; 79 N. E. 97 (1906).

[Case for personal injuries.. Opinion by Mr. Justice Hand.]

* * * The appellant was injured at East Chicago, in the state of Indiana, and the contention is made that, the action having been brought in this state, the law of the state of Illinois controls the right of recovery. The trial court instructed the jury that the law of the state of Indiana controlled. The appellant's contract of employment was made in Indiana, to be performed in that state, and was made with reference to the law of that state; and while the action is transitory, and may be brought in this state if service can be had upon the defendant in this state, there can be no doubt that the law of the state of Indiana

controls in determining whether the appellant is entitled to recover. Herrick v. Minneapolis & St. Louis Railway Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Leonard v. Columbia Steam & Navigation Co., 84 N. Y. 48, 38 Am. Rep. 491; Dennick v. Central Railroad Co. of New Jersey, 103 U. S. 11, 26 L. Ed. 439. To establish the law of the state of Indiana with reference to actions of this character, the appellee introduced in evidence before the court, and out of the presence of the jury, certain statutes and reported decisions of the Appellate and Supreme Court of that state, and it is said by the appellant the action of the court in that regard was erroneous, and it is urged if the law of Indiana is to control, that then the court should have received in evidence said statutes and reported decisions in the presence of the jury, and allowed the jury to determine from the Indiana statutes and reported decisions of the courts of that state the law of that state, and whether under the law of that state, as found by them, the appellee was liable. While there is some conflict in the authorities upon the question, the great weight of authority and the better reason, we think, supports the view that while a foreign law must be proved as a fact, the proof thereof, in a case like this, should be made to the court, and not to the jury. 1 Greenleaf on Evidence, § 486; 1 Thompson on Trials, § 1054; 13 Am. & Eng. Ency. of Law (2d Ed.) p. 1071; Bank of China v. Morse, 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676; Pickard v. Bailey, 26 N. H. 152. Mr. Greenleaf thus lays down the law upon the subject (section 486): "The established doctrine now is that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts. And the better opinion seems to be that this proof must be made to the court, rather than to the jury. 'For,' observes Mr. Justice Storey, 'all matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them.'"

It is also urged that the court erred in receiving in evidence said statutes and reported decisions, by reason of the fact that they had not been pleaded by appellee in defense of the action. The general rule is that a foreign law must be pleaded. That rule has its exceptions, and it does not apply in a case like this. The plea of not guilty was filed, and under that plea the appellee was properly permitted to introduce in proof, as a part of its defense, the law of the state of Indiana, so far as it was material to show there was no liability resting upon appellee to respond in damages to appellant for the injury which he had sustained. In the City of Chicago v. Babcock, 143 Ill. 358, on page 364, 32 N. E. 271, on page 273, it was said: "In such an action [an action on the case] the defendant is permitted, under the general issue, to give in evidence a release, a former recovery, a satisfaction, or any other matter ex post facto which shows that the cause of action has been discharged, or that in equity and conscience the plaintiff ought not to recover." In Thompson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536, it was held that the laws of another state as to pleading and proof stand upon the same footing as any other facts, and are mere matters of evidence. Furthermore, the appellant, when the statutes of Indiana and the decisions of the Appellate and Supreme Courts of that state were offered in evidence, objected to having them read in the presence of the jury, and stated that he did not object to their being read to the court, and at no time, so far as we have observed, raised the question in the court below that said laws had not been properly pleaded. The appellant, therefore, seems to have waived the right to raise the questions that the statute law and decisions of the courts of Indiana were not submitted to the jury or were not properly pleaded at this time although those questions have been fully discussed in the briefs filed by the respective parties. * * *

(18) TOLEDO, WABASH & WESTERN RY. CO. v. CHEW.

67 Ill. 382 (1873).

[Assumpsit. Opinion by Mr. Justice Thornton.]

* * * The theory upon which the plaintiff must have recovered, and was entitled to recover, was, that he had delivered ties, in pursuance of a contract with the parties constructing the road, upon the line of the Decatur and East St. Louis Railroad; that some of them were estimated and paid for by the contractors; that when the Decatur and East St. Louis Railroad Company accepted the road from the contractors and when the consolidation was effected [with the appellant railway company], unestimated ties, the property of the plaintiff, were upon the line of road, and were taken and used by the appellant corporation, some of them were placed upon the road-bed, and some were used as wedging in making repairs.

Was the company liabel for the ties thus used? They were wholly converted to the use of the company, became a part of its road, and could not be readily separated therefrom. Some of them were imbedded in the earth and the iron spiked upon them, and others were split up and driven under the ties imbedded. There could be no more complete conversion and appropriation of the property of the plaintiff. They were not taken to be converted into money, but for the construction and repair of the road, and were effectually converted into money's worth. They were delivered to be used upon the road, and were thus used; and though the taking may have been to some extent tortious, the plaintiff might waive the tort and recover in indebitatus assumpsit, as the company had applied the ties to its own benefit.

Greenleaf says: "If one commit a tort on the goods of another by which he gains a pecuniary benefit, as, if he wrongfully takes the goods and sells them, or otherwise applies them to his own use, the owner may waive the tort and charge him in assumpsit on the common counts, as for goods sold or money received." 2 Greenleaf Ev., sec. 108,

and note 3; Putnam v. Wise, 1 Hill, 234, and note A; Lightly v. Couston, 1 Taunton, 112.

In this last case, assumpsit was brought for the work and labor of an apprentice who had been enticed away, though case would have been most usual. Mansfield, Ch. J., remarked: "It is not competent for the defendant to answer that he obtained the labor, not by contract with the master, but by wrong, and therefore he will not pay for it."

Neither should the railway company be permitted to say, true the ties were taken, and they now form a part of the road, but the taking was a trespass, and payment cannot be enforced by an action of assumpsit.

(19) OLCESE v. MOBILE FRUIT CO.

211 Ill. 540 (1904).

[Assumpsit. Opinion by Mr. Justice Boggs.]

* * * The declaration contained two special counts and the consolidated common counts. The first special count averred that the defendant firm contracted in July, 1903, to purchase of the plaintiff three car loads of bananas of the kind and quality known as "Bocas culls," and refused to accept the bananas though tendered to it in compliance with the contract, and that the plaintiff company resold the bananas after notice to the defendant firm, and thereby suffered a loss for which the plaintiff company claims damages. The defendant in error concedes the evidence did not warrant a verdict upon this count. It insists the proof showed the firm accepted these bananas and failed and refused to pay for them and relies on the common counts to authorize recovery therefor. * * * The consolidated common counts averred the defendant firm was indebted to the plaintiff "for divers goods, wares and merchandise and chattels sold and delivered by the plaintiff to the defendants at their special instance and request." The general issue was pleaded to the declaration. * * *

It is complained that the fourth, fifth, sixth and tenth instructions given for the defendant in error authorized

recovery on the theory the firm accepted the July shipment. It is clear the defendant in error company, in the trial court, abandoned recovery for the July shipment on the ground the firm refused to accept the fruit, as charged in the first special count, and claimed the firm accepted the fruit, and relied on the common counts for a verdict and judgment. Its position is, the delivery and acceptance of the bananas shipped in July were established by the evidence, and it was on that theory it sought judgment in the trial court. If the contract for these bananas and the delivery and acceptance of the fruit in pursuance of the contract were proven, and nothing remained to be done but for the firm to make payment, recovery might be had under the common counts. It was upon this theory the instructions complained of were given. * * *

It is urged by way of general objection to a number of instructions, that when an executory contract is set out in the declaration and no more is shown by the evidence, recovery for the breach thereof can not be had under the common counts. The soundness of this rule of pleading so stated is conceded, but the evidence tended to show an executed contract—the delivery of the bananas of the July shipment to the buyer and the acceptance thereof by them —and that nothing remained to be done but the payment of the purchase price, and in such state of facts it is equally well settled that the plaintiff may declare generally in indebitatus assumpsit (4 Cyc. 328; 2 Ency. of Pl. & Pr. 1005)

(20) McKINNIE v. LANE.

230 Ill. 544; 82 N. E. 878 (1907).

This suit was brought in the circuit court of Cook county by Maurice T. Lane against P. L. McKinnie to recover the sum of $1,700, which the former claimed to be due him as a balance on the purchase price of certain paintings sold to McKinnie. The declaration included only the common counts and was accompanied by a bill of particulars, as follows:

To two pictures by Dupres and Mueller.....		$3,500
Credit	$1,700	
Two pictures by Hammerstadt.....	100	
		1,800
Balance due		$1,700

The balance of this amount was to be given in pictures at agreed prices. These pictures were demanded and refused and are now suing for the cash.

Maurice T. Lane,
By Wheeler, Silber & Isaacs, Attorneys.

On June 11, 1900, appellee sold to P. L. McKinnie two paintings, for which he claims he was to receive the sum of $3,500, $1,700 of which he admits was paid in money, and $1,800 he claims was to be paid in other pictures or in cash. Two pictures were received by appellee, as he claims, on the balance due, for which he gave McKinnie credit for $100. A demand for the other $1,700 worth of pictures was, according to appellee's contention, met with a refusal, whereupon suit was instituted September 11, 1903, by appellee to recover the remaining $1,700 in money. The cause was tried by jury in the circuit court, and a judgment rendered in favor of appellee for $1,700. Appeal was prosecuted to the Appellate Court for the First District, where the judgment was affirmed, and by further appeal the record is brought to this court for review. After the trial in the court below, and before the case was passed upon by the Appellate Court, McKinnie died, and his executors were substituted in the case and appear as appellants herein.

McKinnie testified that the purchase price of the paintings was $1,700, which he paid. He submitted a receipted bill showing the purchase price of $3,500, but he explains that by saying: "Mr. Lane called and got his checks for the total amount and brought me a bill made out at $3,500, which bill at $3,500 was an absolute and perfect fiction. I told Mr. Lane I did not care to have a bill made out in that manner, but he said to me: 'Doctor, these pictures are worth more than this money; that is to say, you may be

able to sell them some time for a larger sum than $1,700. And I will take from you a few paintings to sell on commission, and you can let some of them go on this, but this $1,800 on here is simply a booster.' I didn't fancy it, but he persuaded me it was all right. I never agreed to give Mr. Lane any other paintings than the two which he received for these paintings. He wanted me to forward them to him at Pittsburg, which I did, and they are the only paintings which I ever offered to Mr. Lane in the world. It was wholly, purely, absolutely, a fictitious and boosted price." He also submitted in his own behalf a check containing the words, "In full to date." This check was dated June 11, 1900, and was cashed by Lane.

Lane testified that the purchase price of the two oil paintings was $3,500, to be paid $1,700 in money and $1,800 in specific pictures at agreed prices, or in cash; that he received $1,700 in money on delivery of the two paintings, also two pictures at $100; that when he called for the remaining pictures, representing the other $1,700, McKinnie refused to deliver them to him; that he called repeatedly to get them, "three, four, or five times at McKinnie's house," and "at least a dozen times at his office," but was never able to get the remaining pictures. Referring to the check which contained the words "in full to date," he denied that these words were on the check when he received it. He explained the receipted bill by saying: "It was done as I do in thousands of cases dealing with rich people. I merely receipted the bill and called afterwards to get my pictures and could not get them."

Vickers, J. The affirmance of the judgment by the Appellate Court settles all controverted questions of fact adversely to the contention of appellants.

It is contended by appellants that under the bill of particulars filed in this case recovery could not be had under the common counts. It is well-settled law that where there is an agreement to pay a certain sum in specific articles of personal property, at agreed prices, on a particular day, a failure to deliver the articles on the day fixed in the agree-

ment converts the transaction into a money obligation. Borah v. Curry, 12 Ill. 66; Smith v. Dunlap, Id., 184; Bilderback v. Burlingame, 27 Ill. 338; Sleuter v. Wallbaum, 45 Ill. 43. In the case at bar there was no agreement fixing the date for the delivery of the pictures. In such case the law will presume delivery to be made on demand, or at least within a reasonable time. The record shows that after delivering the paintings to McKinnie and receiving the $1,700 in money and $100 in pictures appellee waited two years before bringing suit, making during that time repeated demands for the pictures. Appellee did all the law required of him, and when McKinnie refused to deliver the pictures as agreed he became liable to pay in money to appellee the sum which they had agreed the pictures would have represented had they been delivered. The common counts were sufficient to support that cause of action. The law is well settled that where a contract has been fully performed, and nothing remains to be done but to pay the money, a recovery may be had under the common counts.

Appellants insist that there is a variance between the bill of particulars and the evidence, in that the bill of particulars states that the balance of the amount was to be given in pictures at agreed prices, while the evidence shows that McKinnie was to pay the balance in pictures or in cash. The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit and restrain the plaintiff, on the trial, to the proof of its particular cause or causes of action therein mentioned. Morton v McClure, 22 Ill. 257; McDonald v. People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; Waidner v. Pauly, 141 Ill. 442, 30 N. E. 1025. At the conclusion of his evidence, appellee asked leave to amend his bill of particulars by inserting the words "or cash," in order that the supposed variance might be obviated Upon objection by appellants he was not permitted to make the amendment. A bill of particulars may be amended, and it was proper for appellee to ask leave to amend, and leave so to do should have been granted. Morton v. McClure, supra; Waidner v.

Pauly, supra. If the bill of particulars had been amended as requested, there would have been no ground to claim that a variance existed. The refusal of the court to permit the amendment occurred though the objection of the appellants, and they are not now in position to urge the variance, even if the point was raised below. A party cannot complain of an error which he induced the court to make or to which he consented. Smith v. Kimball, 128 Ill. 583, 21 N. E. 503; Oliver v. Oliver, 179 Ill. 9, 53 N. E. 304; Conness v. Indiana, Illinois & Iowa Railroad Co., 193 Ill. 464, 62 N. E. 221; Glos v. Murphy, 225 Ill. 58, 80 N. E. 59.

Appellants complain that it was error to instruct the jury that if they "find, from the evidence, that the defendant was to pay for said pictures $1,700 in cash and $1,800 either in cash or other pictures," then the issues should be found for the plaintiff. It is contended that the expression "either in cash or other pictures," contained in the instruction, is error, because the bill of particulars mentions pictures only. This instruction was proper under the evidence. * * *

(21) EXPANDED METAL FIREPROOFING CO. v. BOYCE.

233 Ill. 284; 84 N. E. 275 (1908).

This is an action in assumpsit brought by appellee in the circuit court of Cook county, against appellant, to recover for work and labor performed and materials furnished in and about the construction of certain expanded metal and concrete floors and roofs in a paper mill of appellant at Marseilles, Ill., in 1902, and for the use and hire of a certain engine and mixer. The case was tried on a declaration consisting only of the common counts, to which the general issue was pleaded. On the trial the jury found the issues for the plaintiff, and assessed its damages at $4,418.75, and also returned special findings that the work was done in a good and workmanlike manner and the materials furnished were in accordance with the provisions of the contract. The plaintiff remitted the sum of $111.27, and judgment was entered for $4,307.48. On appeal to the Appellate Court the

judgment was affirmed, and the case is brought here for review.

The written contract upon which this action was based is dated January 18, 1902. Drawings and specifications for the work were made a part by reference. Article 1 of the contract provided that "the contractor, under the direction and to the satisfaction of N. F. Ambursen, architect, acting for the purposes of this contract as agent of the said owner, shall and will provide all materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architect," etc. Article 3 provided that no alterations should be made in the work as shown in the drawings and specifications, except upon the written order of the architect, "and when so made the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added or deducted from the contract price," with the further provision that if there was dissent to the architect's finding the question might be left to three disinterested arbitrators to decide. Article 4 provided that if the architect found fault with the work and gave a written notice the contractor should remedy the defects. Article 9 provided that the payments should be made to the contractor for 85 per cent. of the contract price as the work progressed, and final payment be made within 30 days after the contract was fulfilled; that "all payments shall be made upon the written certificate of the architects to the effect that such payments have become due," with the added provision that the owner might retain out of such payments sufficient to indemnify himself against liens or claims against the contractor. Article 10 provided "that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials." The contract price of the work was $8,600.

Carter, J. On the trial of the case in the circuit court a certificate signed by architect Ambursen was offered in evi-

dence by appellee. There is evidence in the record tending to show that the architect had little, if anything, to do with the work in question during its progress, and it is claimed by appellee that the architect had been discharged by the appellant before the work was performed, but we find no positive evidence in the record of this latter fact. At the time the certificate was obtained it appears that the architect was residing in Watertown, N. Y., and arrangements were made with him by appellee to come out to Marseilles, examine the work, and give his certificate. Under the evidence relating to the securing of this certificate the trial court excluded it, and the Appellate Court held that ruling proper. It is earnestly contended by appellee in this court that both the trial and appellate courts erred in this regard. As appellee has not assigned cross-errors, the error, if any, in this regard cannot be raised in this court.

Manifestly, appellee was bound to procure the certificate of the architect showing the performance of the work as provided in the contract and the amount due under it, or show an excuse for not so doing. The chief contention is that, after this certificate was excluded, the court erred in permitting appellee to prove, under the common counts, that there had been substantial compliance with the provisions of the contract as to carrying out the contract and completing the work. We held in Hart v. Carsley Manf. Co., 221 Ill. 444, 77 N. E. 897, 112 Am. St. Rep. 189, that if the architect's certificate in a building contract has not been obtained as therein required, showing the amount due, a recovery cannot be had upon the common counts; that a recovery must be had on the declaration, setting up the contract, the performance as to furnishing materials and doing the work, and stating the reason why the certificate had not been obtained. In City of Peoria v. Construction Co., 196 Ill. 36, 48 N. E. 435, we held that "when work is done under a contract, * * * plaintiff can only recover therefor when he has fully or substantially performed the conditions precedent to his right of recovery as stated in the contract, or else averred and proved a sufficient excuse for his

noncompliance with its conditions." In Chitty on Pleadings (volume 1, 14th Am. Ed., star page 325) it is stated that, "where the matter to be performed is a condition precedent, the performance of that matter must be shown, although a third person was to do the act and he unreasonably refuse his concurrence." The same author in the same volume (star page 326) lays down the rule that, in averring an excuse for non-performance, plaintiff must state his readiness to perform the act and the particular circumstances which constitute such excuse; that, in stating an excuse for non-performance of a condition precedent, plaintiff must, in general, show that the defendant either prevented the performance or rendered it unnecessary by his neglect or by discharging the plaintiff from performance.

In all cases where, under the contract, something is to be done by the plaintiff or some other person, precedent to performance by the defendant, the plaintiff must allege performance of such condition precedent or show some excuse for the nonperformance. 2 Ency. of Pl. & Pr. p. 999, and cases cited; Gould's Pl. (5th Ed.) p. 67. When a building contract provides for an architect's certificate, such provision is a condition precedent to a right of recovery, and the excuse for the nonproduction of such certificate must be alleged and proved. 4 Ency. of Pl. & Pr. 643, and cases there cited.

It has been frequently held by this court that where a contract has been performed, and it only remains for the contract price for labor or property to be paid, plaintiff may sue an recover under the common counts, and the special agreement may be read in evidence for the purpose of showing its terms to recover damages. Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 N. E. 1038; City of Chicago v. Chicago & Northwestern Railway Co., 186 Ill. 300, 57 N. E. 795; Parmly v. Farrar, 169 Ill. 606, 48 N. E. 693. It is therefore insisted by appellee that, as the evidence showed that the architect's certificate was waived by the parties, recovery could be had under the common counts without an averment in the declaration of the waiver, if the evidence

also showed that the contract was performed and nothing remained to be done but to pay the amount due—citing, in support of this contention, Foster v McKeown, 192 Ill. 339, 61 N. E. 514; Evans v. Howell, 211 Ill. 85 71 N. E. 854; Chicago & Eastern Illinois Railroad Co. v. Moran, 187 Ill. 316, 58 N. E. 335; Shepard v. Mills, 173 Ill. 223, 50 N. E. 709; Keeler v. Herr, 157 Ill. 57; Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113. An examination of these cases will show that in the majority of them the question of proving a waiver under the common counts without specially pleading it was not an issue In some of them the rule is laid down that, when a contract has been performed and nothing remains to be done but to pay the amount, recovery could be had under the common counts, and, while there are some general statements in certain of these decisions that tend to uphold the contention of appellee on this question, Foster v. McKeown, supra, is the only one which holds that, when a building contract has been substantially performed, an excuse for failure to procure, as required, the architect's certificate, may be shown under the common counts. We refused to follow this case as an authority on this question in Hart v. Carsley Manf. Co., supra, stating that it was not in accord with the weight of authority.

Counsel for appellee in this case insist that there is a distinction between waiver and excuse; that an excuse for nonperformance is one-sided, while a waiver is two-sided and must be participated in by both parties It is very clear from the authorities heretofore cited that this distinction is not valid. In the Encyclopedia of Pleading & Practice (volume 4, p. 631) it is stated, in discussing this subject, that if the plaintiff intends to rely on facts which show a waiver of performance by the defendant he must plead such facts; that he cannot plead performance and recover under proof of waiver of performance. See, also, page 644 of same volume, and authorities cited.

We think it is clear, by the great weight of authority in

this and other jurisdictions, that, if the architect's certificate is not obtained, recovery can only be had on a declaration setting up the contract and stating the reason for failure to comply with the condition precedent requiring the furnishing of an architect's certificate. Moreover, we are of the opinion that there is no proof in this record that would justify the conclusion that appellant had waived the procuring of the architect's certificate in question. It is claimed that this was waived because partial payments were made from time to time, under said article 9 of the contract, without the architect's certificate, as required thereby. It is not claimed, however, that more than 85 per cent. was paid, and so far as we can find there is nothing in the record to indicate that the provision of article 10 as to the final certificate was waived in any manner by the appellant. This being true, under none of the authorities cited would appellee be permitted to make proof under the common counts that the contract had been substantially performed. * * *

(22) CITY OF CHICAGO v. C. & N. W. RY. CO.
186 Ill. 300 (1900).

[Mr. Justice Cartwright delivered the opinion of the court.]

This suit came on for trial in the superior court of Cook county upon an issue formed by a declaration of appellant containing only the common counts and a plea of non-assumpsit filed thereto by appellee. There had been a special count, to which a plea of the Statute of Limitations was interposed, and the court had overruled appellant's demurrer to the plea. The ruling on the demurrer is assigned for error upon the record but no argument is made in support of the assignment, which is therefore regarded as abandoned.

Chicago avenue runs east and west and Halsted street north and south in the city of Chicago, and the tracks of defendant cross these streets near the point of intersection, running in a diagonal direction from south-east to north-

west. Plaintiff, in order to maintain the issue on its part under the common counts, offered evidence that the tracks obstructed the public use of the streets to such an extent that it became necessary at the point of intersection, in order to restore the streets for the use of the public, to build a viaduct over the tracks, with approaches on Halsted street and Chicago avenue; that plaintiff built such viaduct and approaches and defendant contributed a large part of the cost thereof; that suits were brought against plaintiff by owners of property abutting on the approaches, to recover damages to their property resulting from such construction, and that judgments were recovered by such owners against plaintiff, which it paid. Defendant objected to the proffered evidence on the ground that it was not admissible under the common counts. The objection was sustained and the evidence was not admitted. There being no evidence in support of the declaration, the court instructed the jury to return a verdict for defendant, which they did, and judgment was entered accordingly. The Branch Appellate Court for the First District affirmed the judgment.

The various counts of the declaration were the following: First, indebitatus assumpsit for goods, wares and merchandise sold and delivered; second, quantum valebant for goods, wares and merchandise sold and delivered; third, a consolidated money count in indebitatus assumpsit for money loaned, money paid, laid out and expended for defendant at its request, money had and received by defendant for the use of plaintiff, money due and owing for interest, and money due for work and material; fourth, a count for money found due upon an account stated.

The common counts are founded upon an expressed or implied promise on the part of the defendant to pay money to the plaintiff in consideration of a precedent and existing debt. It has often been said that where there is a contract fully performed and nothing remains to be done but the payment of money by the defendant, the liability may be enforced under the common counts. It is said that in this

case nothing remains to be done by the defendant but to pay the money demanded by the plaintiff. But that may be said of a defendant in any case; and the other part of the proposition, that there must be a contract fully performed by the plaintiff, can not be ignored. There was no contract relation between the plaintiff and defendant with respect to the payment of these damages or concerning any liability of defendant therefor. Appellant sought to prove, not a contract express or implied, but an alleged duty of defendant which was performed by plaintiff. There is no pretense that defendant ever recognized the validity of the claims of property owners or the amount of damages, or agreed in any manner to pay or satisfy them. No count of this declaration would give any hint to the defendant of the claim against which it was called upon to defend, and, of course, the evidence could not be applied to the counts for goods, wares and merchandise, money loaned, money had and received, interest, labor and material, or money due on account stated. They are all utterly foreign to the claim made at the trial. The only count under which it seems to be claimed that the evidence was admissible is the count for money paid out for defendant at its request.

It is argued that if the evidence had been admitted it would have established defendant's duty and legal obligation to build a viaduct, so as to restore the streets to proper condition for public use; that it would have proved that plaintiff performed such duty to the public owing by defendant; that if defendant had performed the duty it would have become liable to pay damages to property owners suffered by reason of the construction of the viaduct and approaches, and that in performing the duty plaintiff became liable to pay these damages, and paid them. It is argued that from these facts the law would raise an implied promise on the part of the defendant to repay plaintiff the money so paid. An action under this count, however, is only sustainable where the money was paid upon the request, expressed or implied, of the defendant. (2 Ency. of Pl. &

Pr. 1012; 1 Chitty's Pl. 350; 1 Shinn's Pl. & Pr. 488.) It is not sufficient that defendant was benefited by the payment, but it must have been done at its request, expressed or implied and plaintiff could only recover on proof of facts that would show such a request of the defendant. One party cannot voluntarily make himself a creditor of another, and if plaintiff paid the obligation of the defendant without its knowledge or consent, it cannot recover such payment back under this count. Durant v. Rogers, 71 Ill. 121.

Again, the alleged liability was not for a debt but for unliquidated damages, which the plaintiff claims were caused by the performance of a duty owing to the public by defendant. The evidence did not relate to the payment of a debt, but of unliquidated damages. The defendant was not a party to the suits by the property owners, either on the record or by notice from defendant to appear and defend, and it was not bound by the judgments recovered. The admission of the evidence in this case would involve a trial upon the merits and an inquiry into the actual damages sustained by the property owner in each case. The amounts paid by the plaintiff being in the nature of unliquidated damages, and not debts due from the defendant, the declaration must be special. 2 Ency. of Pl. & Pr. 1014; Chitty's Pl. 350.

The court was right in refusing to admit the evidence under the pleadings. The judgment of the Branch Appellate Court is affirmed.

(23) NEWTON v. CLARKE.

235 Ill. 530; 85 N. E. 747 (1908).

Hand, J. This was an action of assumpsit commenced in the superior court of Cook county on March 20, 1906, by the appellee, against the appellant, to recover upon the following promissory note: "$500. Chicago, December 29, 1903. May 10, 1904, after date I promise to pay to the order of myself five hundred and no/000 dollars at Chicago. Value received, with interest at the rate of seven per cent.

per annum after maturity. John B. Newton"—which had indorsed upon the back thereof "John B. Newton" and "T. L. Moran." The declaration upon which the case was tried contained three special counts and the consolidated common counts, and had attached thereto a copy of said note, with the indorsements thereon, to which the appellant pleaded the general issue and a special plea setting up want of consideration. The first special count in the declaration is by the appellee, as second indorsee, against appellant, as maker, and the second and third special counts are by the appellee, as first indorsee, against the appellant, as maker, and the common counts are in the usual form. The jury under the direction of the court returned a verdict against the appellant for $570, upon which the court, after overruling motions for a new trial and in arrest of judgment, rendered judgment, which judgment has been affirmed by the Appellate Court for the First District and, a certificate of importance having been granted by that court, a further appeal has been prosecuted to this court.

It is contended by the appellant that the trial court erred in admitting the note, with the indorsements thereon, in evidence, as it is said there is a variance between the note and each of the special counts of the declaration, and the execution of the note by Newton was not proven. If that contention be conceded to be correct, still we think the note was properly admitted in evidence under the common counts. There was no plea on file, verified by affidavit, denying the execution or assignment of the note, and under section 33 of the practice act (3 Starr & C. Ann. St. 1896, p. 3017, c. 110, par. 34), which reads as follows: "No person shall be permitted to deny, on trial, the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit; and if plaintiff, shall file his affidavit denying the execution or assignment

of such instrument: Provided, if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party"—it was not necessary for the appellee to prove the execution of the note before it was admissible in evidence under the common counts. The statute now in force is different from the one in force when the case of Hall v. Freeman, 59 Ill. 55, was decided. We think, therefore, the court did not err in admitting the note in evidence under the common counts.

It is also contended that the evidence showed the note to have been without consideration. The only evidence bearing upon that issue was the testimony of the appellant, who upon the trial testified that Moran proposed to him that if he would take 500 shares of stock in an oil company he represented, so that he could make a showing to other people, and give him a note therefor, at the time the note was due he need take only 100 shares of the stock if he did not want the 500 shares, and that with that understanding he signed the note and indorsed it and delivered it to Moran; that the stock was to be delivered when the note was paid; that he had not paid the note or received the stock, and that he had never seen and did not know the appellee. The evidence, therefore, failed to show that the appellee had notice of what the consideration of the note was, or when he purchased it. The presumption, therefore, was he purchased the note before maturity, for value, in the due course of business, and that he was an innocent holder. Mulford v. Shepard, 1 Scam. 583, 33 Am. Dec. 432; Depuy v. Schuyler, 45 Ill. 306; Wightman v. Hart, 37 Ill. 123.

It is, however, urged that, the note having been introduced in evidence under the common counts, the presumption that the appellee was a purchaser before maturity, and for value, and was an innocent holder of the note, does not obtain in his favor. The note, as we have seen, was properly admitted in evidence under the common counts, and, when admitted, the same presumption obtained in favor of the appellee being an innocent holder thereof, for value,

before maturity, as though it had been introduced in evidence under a special count declaring upon the note. Johnson v. County of Stark, 24 Ill. 75; Gilmore v. Nowland, 26 Ill. 200; Bilderback v. Burlingame, 27 Ill. 338; Nickerson v. Sheldon, 33 Ill. 372, 85 Am. Dec. 280; Boxberger v. Scott, 88 Ill. 477. The appellant had the right to show want of consideration when the note was introduced under the common counts without specially pleading that defense (Wilson v. King, 83 Ill. 232), and he attempted so to do, but failed, as his proof did not show that the appellee had notice of the fact, if such was a fact, that the note was without consideration or he purchased the note after it was past due. The introduction of the note made a prima facie case in favor of the appellee, and as the appellant failed to overcome the prima facie case made by the appellee, the court properly directed a verdict in favor of the appellee.

(24) RUBENS v. HILL.
213 Ill. 523; 72 N. E. 1127 (1905).

This is an action in assumpsit, brought by appellee, Martha S. Hill, in the Circuit Court of Lake County, against the appellant, Harry Rubens, on September 30, 1902, to recover four months' rent at the rate of $833.33⅓ a month for the premises known as "Ravinoaks," at Highland Park in the said county, a country seat, consisting of a mansion and about eighteen acres of land, and also the furniture, carpets, hangings, and other articles of personal property on the premises at the time of the demise, and which said premises and personal property were leased to appellant by appellee for the six months during the summer of 1902, from April 15th to October 15. A schedule of the personal property was attached to the lease. By the terms of the lease appellant covenated that "in consideration of said demise" he would pay to the appellee $5,000 rent for the said period of six months in six monthly installments, the first payment to be made, not at the date of the execution of the lease, which was February 1, 1902, but on April 15th, the date when the lessee was to take possession. On

or about the first day of the term, to wit, April 15, 1902, appellant paid the first month's rent for the period from April 15 to May 15, 1902, and his family then took possession of the property, and continued to reside there until the end of the term, October 15, 1902. His family consisted of himself, his wife, his son, two married daughters and their husbands, two grandchildren, two nurses, and four other woman servants, all of whom lived in the dwelling house. Another grandchild was born to one of his daughters in the dwelling house about September 1, 1902. On May 19, 1902, the appellant paid the second month's rent, which had fallen due about May 15, 1902, to wit, the sum of $833.33⅓; but appellant paid no more rent after May 19, 1902.

The declaration consisted of the common counts, except that there was inserted in it in the ordinary form of the consolidated common counts, after the count for money due on an account stated and before the conclusion, the following: "And in the like sum ($5,000) for money due from the defendant to the plaintiff for rent of certain premises and property of the plaintiff there situate, before that time demised and rented by the plaintiff to the defendant at his request." The declaration then concludes as follows: "And being so indebted, the defendant, in consideration thereof, then and there promised to pay the plaintiff on request the several sums of money so due to him as aforesaid. Yet defendant, though requested, has not paid the same, or either of them, or any part thereof, to the plaintiff, but refuses so to do, to the damage of the plaintiff of $5,000," etc. Attached to the declaration as an exhibit was a copy of the lease between the parties.

The pleas were: (1) The general issue. (2) A special plea to the count for rent that, "after the making of the said supposed demise aforesaid, the plaintiff, with force and arms, etc., wrongfully and unlawfully withheud from possession of this defendant a portion of the said premises, and refused to let this defendant into possession thereof, although often requested so to do, etc., and continuously

thereafter until, to wit, the time aforesaid, refused to let this defendant into possession thereof," concluding with the verification. (3) A special plea to the count for rent that "the said plaintiff, with force and arms, etc., entered into and upon said premises in said count of said declaration alleged to have been demised to this defendant, and into and upon the possession of this defendant, and ejected, expelled, put out, evicted, and amoved this defendant, and kept him so ejected, expelled, put out, evicted, and amoved from the possession thereof, from thence hitherto," etc., concluding with the verification. (4) Special plea that the "said plaintiff, with force and arms, etc., wrongfully and unlawfully entered into and upon the said premises in said declaration alleged to have been demised to this defendant, and into and upon the possession of this defendant, and ejected, expelled, put out, evicted, and moved this defendant from the possession of a large part of said premises, to wit, a certain tower and certain engine house or building, and portions of a certain barn or stable, being part and parcel of said premises so alleged to have been demised to this defendant, as aforesaid, and kept this defendant so ejected, expelled, put out, evicted, and amoved from the possession thereof from thence hitherto," concluding with the verification. Replication was filed by the plaintiff to these pleas on November 11, 1903, to which replication a demurrer was subsequently confessed by plaintiff, and an amendment made thereto in pursuance of leave to amend the same, given by the court. Upon the issues thus joined, the parties went to trial.

The jury returned a verdict for the plaintiff for the full amount sued for, together with interest to the time of the trial—that is to say, for the amount of rent due by the terms of the lease for the last four months of the rental period, beginning with June 15, 1902, and ending with October 15, 1902. Motions for new trial and in arrest of judgment were overruled, and judgment was entered upon the verdict, less the amount of $2.02 remitted from the verdict by the appellee; and the amount of the judgment rendered

was $3,547.42. The judgment for this amount has been affirmed on appeal by the Appellate Court for the Second District, and the appellant now prosecutes this further appeal to reverse said judgment of affirmance.

The tract of eighteen acres above referred to was divided by a ravine, running westerly from the lake shore, into two irregular halves or portions, called in the testimony the north half and the south half of the place. On the north half was a dwelling house and a stable. On the south half, which was improved as a kind of park, was a brick and stone tower with a windmill on the top of it, and there were steps leading down the bluff, which at that point was about sixty feet high, from near this tower to the beach of the lake, and at the beach there was a machine house. In the stable there were sleeping rooms on the second floor for certain of the employes upon the place.

The lease recites "that the party of the first part [appellee] for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the party of the second part [appellant], has demised and leased to the party of the second part the premises [as above described], together with all the buildings and improvements thereon, to be occupied as a dwelling house and country seat," together with the personal property above mentioned; "to have and to hold the same unto the party of the second part, from the 15th day of April, 1902, until the 15th day of October, 1902. And the party of the second part, in consideration of said demise, does covenant and agree with the party of the first part as follows: First, to pay as rent for said demised premises the sum of $5,000, payable in six equal monthly installments of $833.33 each, the first of said installments to be paid on the 15th day of April, 1902, and the other five installments, each to be paid on the 15th day of each succeeding month until the said sum of $5,000 shall have been fully paid; second, the said party of the first part hereby agrees to cause said premises to be put into a habitable condition, and make the same ready for occupancy by the said party of the second part,

on or before the said 15th day of April, 1902; meaning and intending hereby that the boards covering the windows and doors of the dwelling house shall be removed by the said party of the first part, the fixtures connected with the plumbing, and the dwelling house put in condition for occupancy." By the terms of the lease the lessor agrees to employ a gardener on the premises, and such additional help as may be necessary to maintain the lawns, shrubbery, vegetables, etc.; and also to keep a horse and wagon in the barn, to be used by the gardener in the performance of his work; also to pay the water rents and the expense of sprinkling Sheridan road in front of the premises; also to cause the garden thereon to be planted with certain vegetables for the use of the lessee, provided that the gardener employed by the lessor be allowed to have certain seeds for the planting of the crop of the next season, and enough vegetables to supply his own table; also to have the lawn fertilized at her own expense if necessary; also to sell to the lessee the chickens on the place at the beginning of the lease, the gardener to have the privilege of supplying himself with eggs, etc. The seventh clause of the lease was as follows: "It is agreed that the wind-mill on the water tower on the premises is not in order to supply water, and is not to be operated." The lease contains further provisions to the effect that the parties will meet for the purpose of checking up the articles of personal property leased to the lessee; also to the effect that, in case the dwelling house or barn should be destroyed by fire prior to April 15, 1902, and should not be rebuilt before April 15, 1902, then the lease should, at the option of the lessee, be null and void. The eleventh clause of the lease, so far as it is necessary to quote the same, is as follows: "The said party of the second part [the lessee] hereby agrees that he will keep said premises in good repair, and will immediately replace all broken globes, glass or fixtures with those of the same size and quality as that broken, and will keep said premises and appurtenances in a clean and healthy condition, according to the city ordinances and direction of the proper public

officers, during said term, and upon the determination of this lease in any way, will yield up said premises and said personal property to said party of the first part in good condition, loss by fire and ordinary wear and tear excepted." By the terms of the lease the lessee agrees that the premises shall not be used for any other purpose than as a dwelling house for himself and family, and that he will not sublet the same, nor assign the lease without the written consent of the landlord, etc., "and will not permit the same to remain vacant or unoccupied for more than ten consecutive days, and will not permit any alteration of or upon any part of said demised premises, nor allow any signs or placards posted or placed thereon." The last clause of the lease is as follows: "In case said premises shall be rendered untenantable by fire or other casualty, on or after April 15, 1902, and during the term of this lease then the lessee may at his option terminate this lease."

Magruder, J. 1. The first objection made by the appellant is that the lease was not admissible under the declaration, and that, therefore, its admission by the trial court was error. The charge is made that there was a variance between the allegations of the declaration and the terms of the lease introduced in evidence. It is said that the declaration counted upon an absolute, unconditional agreement to pay money, and that the lease offered in evidence contained conditions precedent to be performed by appellee before appellant was bound to pay any money; and that, therefore, there was a fatal variance. The provision of the lease which counsel for appellant, in their objections on the trial below, pointed out as constituting a condition precedent, is the provision which requires appellee "to cause said premises to be put into a habitable condition and make the same ready for occupancy by the said party of the second part on or before the said 15th day of April, 1902," etc. If the agreement of the appellee to cause the premises to be put into a habitable condition and to make the same ready for occupancy before the commencement of the term involves or is equivalent to an agree-

ment to repair the premises, then it constitutes an independent covenant merely. In the construction of a particular provision the intention of the grantor governs, and, where there is any doubt whether the intention of the grantor is to create a covenant or to create a condition, the courts are inclined to construe it as a covenant, and not as a condition. 6 Am. & Eng. Ency. of Law (2d Ed.), p. 502, Davis v. Wiley, 3 Scam. 234; Lunn v. Gage, 37 Ill. 19, 87 Am. Dec. 233. The provision in question being a covenant, can not be regarded otherwise than as an independent covenant. It is only where covenants are dependent that the performance by each party of his own covenant is a condition precedent to his right to recover on the covenant of the other party. 18 Am. & Eng. Ency. of Law (2d Ed.), p 620. If the provision in question be regarded as a covenant to repair, then it is independent of the covenant to pay rent. The general rule is that the covenant of the landlord to repair or make improvements, and the covenant of the lessee to pay the rent, are independent. 18 Am. & Eng. Ency. of Law (2d Ed.), p. 620; Haven v. Wakefield, 39 Ill. 509. It is to be observed that, in the case at bar, appellant, as lessee, covenants to pay rent in consideration of the demise alone, and not in consideration of both the demise and of the agreement to put the premises into a habitable condition and make the same ready for occupancy before the beginning of the term. This is another circumstance going to show that the covenant as to habitability and occupancy is dependent of the covenant to pay rent. In Baird v. Evans, 20 Ill. 29, where the lessor agreed to make certain improvements upon the leased premises, and the agreement was held to be a condition precedent to the payment of the rent, the consideration for the payment of the rent was not merely the leasing of the premises, but the making of the improvements. Such is not the case here, and hence the covenant here under consideration, being an independent covenant, is not a condition precedent. If such a covenant is violated, the lessee has an action against the lessor for damages, or can recoup for damages. Nelson

v. Oren, 41 Ill. 18; White v. Gillman, 43 Ill. 502; Lunn v. Gage, 37 Ill. 19, 87 Am. Dec. 233; Wright v. Lattin, 38 Ill. 293; Haven v. Wakefield, 39 Ill. 509; Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247.

But let it be admitted that appellant agreed to pay rent, not only in consideration of the leasing of the premises to him, but also in consideration of the agreement that appellee would put them into a habitable condition and make them ready for occupancy before the beginning of the term on April 15, 1902; then, in such case, the consideration has two parts, one of which is the leasing of the premises, and the other is the making of the same habitable and fit for occupancy. It is well settled that where a covenant goes only to a part of the consideration on both sides, and the breach of such covenant may be readily compensated for in damages, it is generally considered independent. 18 Am. & Eng. Ency. of Law (2d Ed.), p. 619.

In Nelson v. Oren, supra, where in consideration of a certain sum of money, Nelson assigned a lease to Oren, and in the same instrument agreed to deliver up possession of the premises on a certain day, and the lease was assigned, but Oren failed to get possession on the day agreed upon, it was held that an important part of the consideration was executed by the transfer of the term, although the remaining part was not executed, and that, for the breach of the latter, appellee had a right to recover damages; and in that case we said (page 23, 41 Ill.): "We do not consider that delivery of possession, under a fair construction of this covenant, was a condition precedent to the right of appellant to recover for the unexpired term. That would seem to be the most important part of the contract, and where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. * * * The covenant to put the appellee in possession was an independent covenant, the breach of which

could be compensated in damages." So, here, the covenant as to habitability and occupancy was an independent covenant, the breach of which could be compensated in damages, and it was not necessary to aver the performance thereof in the declaration.

In Wright v. Lattin, supra, we said (page 296, 38 Ill.): "If he [the landlord] covenant to repair before the term commences, it may be the tenant might refuse to enter upon the term until the repairs were made; but, having entered upon the term and received possession, he can not abandon the lease and refuse to pay rent for the breach of any other covenant, except for quiet enjoyment. If the landlord fail to repair according to his covenant, the tenant may recoup the amount from the rent, or may sue upon the covenant." In the case at bar the appellee covenanted to do certain things before the term of the lease began, and, while the appellant might have refused to enter upon the term until those things were done, yet, inasmuch as he did enter upon the term and took possession, and kept possession, until the termination of the lease on October 15, 1902, he cannot refuse to pay rent for the failure of the landlord to do the things which he agreed to do before the commencement of the term. Appellant, while refusing to pay rent, did not abandon the lease.

In White v. Gillman, 43 Ill. 502, where appellee sold to appellant, his landlord, all the crops on his land at a certain price, and agreed to leave the premises in ten days with all his traps, and did leave the premises within the time named, but left a part of such traps, it was claimed by the appellant that removal of all the traps within the time specified was a condition precedent, and, such condition not being performed by appellee, the latter had no right of action to recover the price agreed to be paid; but the construction thus contended for was not allowed.

In Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247, this court said (page 522, 188 Ill., page 252, 59 N. Ed.): "Where the plaintiff's covenant goes to only a part of the consideration, and a breach of the covenant can be

compensated in damages, the defendant cannot rely upon the covenant as a condition precedent, but must perform the covenant on his part, and then rely upon his claim for damages for any breach of the covenant by the other party, either by way of recoupment or in a separate action." We are therefore of the opinion that the covenant here insisted upon by the appellant as being a condition precedent can not be regarded as a condition precedent, and therefore the lease was not inadmissible under the common counts for the reason insisted upon.

Here, there was a performance of the contract. Possession of the premises was delivered to appellant, and he occupied the premises for the full period of six months specified in the lease, and at the expiration of the lease nothing remained for him to do on his part except to pay the amount due for the rent. The contract was fully performed on the part of the plaintiff, and, where such is the case, recovery can be had under the common counts. In Mount Hope Cemetery Ass'n v. Weidenmann, 139 Ill. 67, 28 N. E. 834, this court said (page 74, 139 Ill., page 834, 28 N. E.): "Indebitatus assumpsit lies upon a written contract, though it be under seal, when the plaintiff has performed, and nothing remains to be done under it but the payment of money, which payment it is the duty of the defendant, under the contract, to make. In such case the plaintiff need not declare specially." It is well settled that while there is no liability by implication of law upon an express contract executory in its provisions, yet where there has been full performance and nothing remains to be done but the payment of money, or where there has been only part performance and the remainder has been waived or prevented, and the work performed has been accepted, a recovery may be had under the common counts. Catholic Bishop of Chicago v. Bauer, 62 Ill. 188; Fowler v. Deakman, 84 Ill. 130; Evans v. Howell, 211 Ill. 85, 71 N. E. 854; Foster v. McKeown, 192 Ill. 339, 61 N. E. 514; 2 Greenleaf on Evidence, § 114.

It is claimed by counsel for appellant that the declaration is defective in not averring that appellant used or occupied

the premises in question. If such a defect exists in the declaration, we think it was cured by the pleas. The pleas, as set forth in the statement preceding this opinion, averred that, after the making of the lease, the appellee entered upon the possession of the appellant and evicted him. In Wallace v. Curtiss, 36 Ill. 156, where there was a material omission in the declaration, it was held that such omission was supplied by the special plea; it being there said (page 158): "The pleas cured the omission. * * * The issues were not alone on the facts stated in the declaration, but upon the agreement stated in the special pleas, and they may be taken as amendatory of the declaration, of the issue, and verdict, in order to favor the justice of the case." Chitty, in his work on Pleadings, (marginal page 671), cites a case which illustrates this principle, and says that, in an action for trespass for taking a hook, where the plaintiff omitted to state that it was his hook and that it was in his possession, and the defendant in his plea justified the taking the hook out of the plaintiff's hand, the court held, on motion in arrest of judgment, that the omission in the declaration was supplied by the plea. We think, moreover, that such other formal defects as are alleged by the appellant to exist in the declaration, were cured by the verdict, and under the statute of amendments and jeofails, which latter statute provides that "judgments shall not be arrested * * * for any mispleading, insufficient pleading," etc. 1 Starr & C. Ann. St. (2d Ed.), p. 390, c. 7, par. 6; Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14; 1 Chitty's Pl. pp. 682-684. * * *

(25) C. & A. R. R. CO. v. CLAUSEN.
173 Ill. 101; 50 N. E. 680 (1898).

Cartwright, J. Appellee brought this suit against appellant to recover damages for injuries alleged to have been sustained by the starting of a train on which he was a passenger, while he was attempting to get off at appellant's station at Gardner, Illinois. There was a judgment for appellee, which has been affirmed by the Appellate Court.

It is argued at much length that the trial court improperly overruled a demurrer to the first original count and five amended counts of the declaration upon which the case finally went to trial. No error has been assigned upon such ruling on the demurrer, either in the Appellate Court or this court, and none could be so assigned, for the reason that after the demurrer was overruled the defendant pleaded the general issue, and thereby raised an issue of fact, which was tried. It has always been the rule in this state that if a party wishes to have the action of a court in overruling his demurrer reviewed in this court, he must abide by the demurrer. By pleading over he waives the demurrer and the right to assign error upon the ruling. Lincoln v. Cook, 2 Scam. 61; Wann v. McGoon, Id. 74; Nye v. Wright, Id. 222; Dickhut v. Durrell, 11 Ill. 72; Walker v. Welch. 14 Ill. 277; Express Co. v. Pinckney, 29 Ill. 392; Gardner v. Haynie, 42 Ill. 291; Grier v. Gibson, 36 Ill. 521; Hull v. Johnston, 90 Ill. 604; Dunlap v. Railway Co., 151 Ill. 409, 38 N. E. 89; Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841.

Defendant made a motion in arrest of judgment which was overruled, and that is assigned for error; but, having once had the judgment of the court on its demurrer, it could not again invoke it for the same reasons by motion in arrest. After a judgment overruling a demurrer to a declaration, there can be no motion in arrest of judgment on account of any exception to the declaration that might have been taken on the agument of the demurrer. Rouse v. Peoria Co., 2 Gilman 99; Coal Co. v. Hood, 77 Ill. 68; Express Co. v. Pinckney, supra; Independent Order of Mutual Aid v. Paine, 122 Ill. 625, 14 N. E. 42. While the defendant, by pleading over, waived its demurrer, and the right to assign error upon the ruling of the court on the demurrer, it did not waive innate and substantial defects in the declaration which would render the declaration insufficient to sustain a judgment; and the question whether it is so far defective may be considered under the assignments of error. The question which may be thus presented is not as broad

as those questions which may be raised by demurrer, for the reason that defects in pleading may sometimes be aided by the pleadings of the opposite party, or be cured by the statute of amendments and jeofails or by intendment after verdict. The objections made to the various counts of the declaration are that the statements therein are too general and indefinite in failing to show how the starting of the train operated to throw plaintiff from it, and in what manner it was started, and that the various counts allege certain duties on the part of the defendant and charge the neglect and violation of other duties, and the doing of other acts foreign to the duties so alleged, as the cause of the supposed injuries. So far as the declaration is defective in the respects complained of, the defendant's plea of the general issue of course could not aid or supply any omission or informality therein. It is also true that the statute of amendments and jeofails does not extend to cure defects which are clearly matters of substance. It provides that judgment shall not be reversed for want of any allegation or averment on account of which omission a special demurrer could have been maintained, but it does not protect a judgment by default against objections for matter of substance. Many such objections, however, have always been cured, at the common law by a verdict. At the common law, independently of any statute, the rule was and is "that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." 1 Chit. Pl. 673. This rule was quoted and approved in Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14, and Railroad Co. v. Hines, 132 Ill. 161, 23 N. E. 1021. The intendment in such case arises from the joint effect of the verdict and the issue upon which it was given, and, if the

declaration contains terms sufficiently general to comprehend, by fair and reasonable intendment, any matter necessary to be proved, and without proof of which the jury could not have given the verdict, the want of an express statement of it in the declaration is cured by the verdict. Under this rule a verdict will aid a defective statement of a cause of action, but will never assist a statement of a defective cause of action. 1 Chit. Pl. 681. Where the declaration and the issue joined upon it do not fairly impose the duty on the plaintiff to prove the omitted fact, the omission will not be cured (Steel Co. v. Shields, 134 Ill. 209, 25 N. E. 569), and if, with all the intendments in its favor, the declaration is so defective that it will not sustain a judgment, such defects may be taken advantage of on error. (Wilson v. Myrick, 26 Ill. 34; Schofield v. Settley, 31 Ill. 515; Railroad Co. v. Hines, supra; Culver v. Bank, 64 Ill. 528). The rule was applied in Haynes v. Lucas, 50 Ill. 436, and the judgment was reversed. That was an action in debt on a contract for the sale of land, and a plea of nil debet, which was bad, had been filed; but it was said that, if the plea had been good, the defect would be ground of error. So in Kipp v. Lichtenstein, 79 Ill. 358, the declaration was so defective that it would not sustain a judgment, and it was held that the objection might be taken on error. That was an action of debt on a supposed statutory liability, and the statute had been repealed. It was held sufficient ground for the reversal that the declaration showed no cause of action. In People v. City of Spring Valley, 129 Ill. 169, 21 N. E. 843, there was an information under which the judgment would be one of ouster against the corporation for not having been legally organized, and the information admitted that it was legally organized. The information was held so defective that it could not support a judgment, and it was said that such defect might be availed of on error even after a demurrer to a declaration had been overruled, and the defendant had pleaded over. Such an objection is not waived by pleading, and a party who has no cause of action can not sustain a judgment in his favor.

When these rules are applied to the declaration in this case, we are satisfied that, although not very well drawn, it is clearly sufficient to sustain the judgment. So far as its allegations that it became and was the duty of the defendant to do certain things are concerned, they are mere conclusions of law which are not traversable. It is not sufficient in a declaration to allege that it is the duty of the defendant to do certain things, but the declaration must state facts from which the law will raise the duty. Ayers v. City of Chicago, 111 Ill. 406. The relative rights and obligations of plaintiff and defendant as passenger and carrier, are matters of law, and the objection that the duty alleged as a conclusion of law does not harmonize with the fact averred as a breach of the duty does not render the declaration insufficient to sustain the judgment, if it contains facts sufficient to raise the duty of which a breach is alleged. It is averred that the plaintiff became a passenger in the passenger train of defendant at Dwight, to be carried from that place to Gardner, and that while he, with due care, caution and diligence, was about to alight from the train at Gardner, the defendant carelessly and negligently caused the train to be violently and suddenly moved forward, and thereby he was thrown from and off the train to and upon the wooden platform of defendant, and thereby injured; and in different counts it was alleged that defendant did not stop the train at Gardner a sufficient length of time to receive and let off passengers, but suddenly started the train, whereby plaintiff, who was attempting to alight, was thrown off and injured. Under the issue joined, the declaration was sufficient after verdict.

At the close of plaintiff's evidence, defendant entered a motion to exclude it, and offered an instruction that the jury should find the defendant not guilty. The court denied the motion, and refused to give the instruction, and the defendant thereupon proceeded to offer evidence in its behalf. The motion was not renewed or the instruction asked at the close of all the evidence, and the defendant thereby abandoned its motion and instruction, and can not complain of

the action of the court in that regard. Railway Co. v. Velie, 140 Ill. 59, 29 N. E. 706; Harris v. Shebek, 151, Ill. 287, 37 N. E. 1015. The questions of fact which are argued can not, therefore, be considered in this court for the purpose of determining whether there was sufficient evidence to raise an issue for the jury.

It is next complained that the court improperly permitted plaintiff to exhibit to the jury a rupture alleged to have been caused by the accident. It is primarily within the discretion of the trial court to permit an injury to be shown to the jury for any legitimate and proper purpose that will aid in the determination of the issue, and this is conceded by counsel; but it is contended that in this case there was an abuse of discretion, because the existence of the rupture, and the nature and extent of it, were not controverted by the defendant; and this was stated to the court when it was proposed to make the exhibition. It is questionable whether the exhibition was proper under the circumstances, and whether its only effect would not be to excite feeling, rather than to aid in settling any disputed question; but we do not feel prepared to say that such was the case, or that there was a clear abuse of the discretion confided to the trial court.

It is also argued that there was a variance between the declaration and the evidence as to the manner in which the injury occurred. This question was not raised in the trial court by objection to the evidence when offered, nor by motion to exclude it, nor on the motion to direct the verdict at the close of plaintiff's evidence. The objection of variance, when presented as one of law for review, must be raised in some way upon the trial, and pointed out, so as to enable the trial court to pass upon it. Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 34 N. E. 801; Harris v. Shebek, supra. Although the alleged variance was not a ground of the motion to exclude plaintiff's evidence and direct a verdict, it is insisted that this court should presume that it was argued to the trial court on that motion. That is not the rule, but every presumption is in favor of the action of the

trial court, and the bill of exceptions must show that the question of variance upon which a ruling was asked was presented to the court.

It is claimed that the damages allowed were excessive, but that is a question of fact settled by the judgment of the Appellate Court.

It is said that some of the instructions given at the instance of the plaintiff were erroneous, but we do not think that they are objectionable. The judgment of the Appellate Court will be affirmed. Judgment affirmed.

PITT'S SONS MFG. CO. v. COMMERCIAL NATIONAL BANK.

121 Ill. 582; 13 N. E. 156 (1887).

Plaintiff in error made and delivered to Meeker & Co. its three promissory notes, which the payees assigned to defendant in error, who brought suit thereon. The defendant pleaded specially three pleas; but reliance was placed upon the second amended plea, which was as follows: "Now comes the said defendant by its attorneys, and by leave of the court," etc., "and defends," etc., "and says actio non," etc., because it says that the causes of action set forth in the special counts and in the common counts of said plaintiff's declaration are one and the same, and not other or different; that the only demand said plaintiff has against said defendant is upon the promissory notes, copies of which are attached to the said declaration, and which are declared upon in the special counts thereof. This defendant further says that the plaintiff was not a bona fide holder, but held the notes in trust for Meeker & Co.; that, on the day named, defendant was in embarrassed circumstances, and unable to meet its financial obligations; that Meeker & Co., then the owners of the notes, were threatening suit thereon; that defendant was then indebted to Meeker & Co. on the notes, and also was indebted upon debts due to certain other creditors [naming them], which last-named creditors also threatened suit; that Meeker & Co., "at the request of the

defendant, and in consideration that the other creditors aforesaid of defendant would withhold suits against defendant, and give further day of payment, then and there agreed with defendant, and with the other creditors of defendant aforesaid, to withhold suit against defendant, and to extend the time and give further day of payment, as follows [naming such time] and not to sue defendant upon either of said notes until default is made in the said payments upon the said further days as aforesaid;" that Meeker & Co. and the creditors named, "in consideration that each should withhold suit, and give further days of payment, as aforesaid, then and there mutually agreed to and did withhold suits; and did give further days of payment, as aforesaid, and then and there mutually agreed not to bring suit until default had been made in the payments upon said further days of payment as aforesaid; and this defendant is ready to verify; wherefore it prays judgment," etc. This suit was commenced and plea filed before either of the installments became due according to the agreement set up in the plea. A demurrer to the plea was sustained. The defendant stood by its plea, and final judgment for plaintiffs was rendered, which the Appellate Court for the Second District affirmed. The record is brought here by writ of error to that court.

Shope, J. The common-law system of pleading has prevailed in this state, and from time to time such modifications have been made by statute as seemed to be required, removing arbitrary and artificial distinctions, and by the allowance of amendments at any and every stage of proceeding, and to every reasonable extent, doing away with its purely technical and objectionable features. As a system of pleading, and as existing in this state, it is clearly defined, easily understood, and certain. With the general, logical arrangement of the system as at common law there has been no interference by statute. The order of pleading, and the structure and office of pleas of different character, remain substantially unchanged.

Without entering into an extended discussion, a state-

ment of some of the principles of pleading seems necessary. Pleas are divided into two general classes, viz.: dilatory and peremptory; otherwise designated as pleas in abatement and pleas in bar. A plea in abatement is defined to be a plea that, without disputing the justness of the plaintiff's claim, objects to the place, mode, or time of asserting it, and requires that therefore, and pro hac vice, judgment may be given in his favor, leaving it open to renew the suit in another place or form, or at another time; while to the second class belong all those pleas having for their object the defeating of the plaintiff's claim. Hence a plea in bar of the action may be defined as one which shows some ground for barring or defeating the action, and makes prayer to that effect. Pleas in bar and pleas in abatement have therefore this marked distinction: pleas in bar are addressed to the merits of the claim, and as impairing the right of action altogether; whereas pleas in abatement tend merely to divert, suspend, or defeat the present suit. 1 Saund. Pl. & Ev. 1, 2; Com. Dig., tit. "Abatement;" 1 Chit. Pl. 441. Owing to the nature and effect of pleas in abatement, they are required to be certain to every extent. Com. Dig. tit. "Abatement," I, 11. Whenever the subject-matter to be pleaded is to the effect that the plaintiff can not maintain any action at any time, it must be pleaded in bar; while matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should be pleaded in abatement. 1 Chit. Pl. 445.

Whether a plea is in abatement or in bar is to be determined, not from the subject-matter of the plea, but from its conclusion. The advantage or relief sought by the plea —the prayer of the plea—determines its character. Jenkins v. Pepoon, 2 Johns. Cas, 312; Tidd, Pr., 637. It would be both illogical and absurd, in a plea in bar, to pray, as in a plea in abatement to the count or declaration, "judgment of the said writ and declaration, and that the same may be quashed;" and as the only relief asked can be awarded, a mistake in this regard is fatal to the plea. And hence the rule that a plea beginning in bar, and ending in abatement,

is in abatement; and though beginning in abatement, and ending in bar, is in bar; so, a plea beginning and ending in abatement is in abatement, though its subject-matter be in bar; and a plea beginning and ending in bar is in bar, though its subject-matter is in abatement. Com. Dig., tit. "Abatement," B 2. With respect to all dilatory pleas, the rule requiring them to be framed with the utmost strictness and exactness is founded in wisdom. It says to the defendant: "If you will not address yourself to the justness and merits of the plaintiff's demand, and appeal to the forms of law, you shall be judged by the strict letter of the law." And so it has been held that a plea in abatement concluding, "Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him," etc. (a conclusion in bar), is bad. Jenkins v. Pepoon, 2 Johns. Cas. 312; Ilsley v. Stubbs, 5 Mass. 280.

An inspection of the plea in question shows that in form and structure, in its beginning and conclusion, it is a plea in bar to the count and declaration; and, upon application of the principles announced, it must be held to be a plea in bar. Its subject-matter, however, is in abatement, and clearly falls within the definition of matter pleadable in abatement. The justness of the plaintiff's demand, that the defendant owes the debt evidenced by the notes, and sued on, is not denied, but the defendant denies that the debt is due. He objects, then, simply as to the time the debt shall be asserted against him. The contract set out in the plea is of an extension of the time of payment; and such a contract, this court has repeatedly held, can not be pleaded in bar of an action brought before the time has expired. Guard v. Whiteside, 13 Ill. 7; Hill v. Enders, 19 Ill. 163; Payne v. Weible, 30 Ill. 166; Archibald v. Argall, 53 Ill. 307; Culver v. Johnson, 90 Ill. 91.

The Circuit Court did not err in sustaining the demurrer to the plea, and, when the defendant elected to stand by its plea, final judgment was properly rendered against it; for the rule is, if matter in abatement be pleaded in bar of the

action, final judgment shall be against the defendant, if the plea be disallowed. Com. Dig., tit. "Amendment," I, 15.

But it is contended that there is a substantial difference between an agreement to extend the time of payment when made simply between the debtor and a creditor, and when made between the debtor and his creditors mutually, as a composition agreement; that while the former has been held no bar, even when made upon a good consideration, the latter presents equities of third parties which courts of law have never refused to enforce, although presented by the debtor; and in support of this last position a number of authorites are cited. Without expressing any opinion as to whether composition agreements may or not be pleaded in bar by the debtor, in cases where suit is brought before the time of payment fixed in such agreement, it is enough to say the agreement pleaded is in no sense a composition agreement. A number of appellant's creditors agreed with him to extend the time of payment of his several debts to them—this and nothing more; and we adopt the language of the Appellate Court that "there is no composition of the debt or displacement of the original contract." That others besides appellees joined in the agreement may go to the consideration of the agreement for extension, but in no way changes the character of the contract.

The judgment of the Appellate Court is affirmed.

(27) UNION TRACTION CO. v. CITY OF CHICAGO.
209 Ill. 445 (1904).

[Special assessment proceeding. Opinion by Mr. Justice Scott.]

* * * Appellant entered a general appearance in the County Court, and this is said to be a waiver of the jurisdictional objection that the estimate was not made a part of the record of the resolution, for the reason that such an objection must be made under a special appearance and that where the appearance is general an objection to the jurisdiction can not afterwards be interposed. This is true where the summons or notice is defective or has not been

served in the manner required by statute and the court's jurisdiction of the party defendant is questioned. In this case appellant was properly in court. This objection is one which challenges the power of the court to proceed for the reason that certain preliminary proceedings were so defective that the court did not obtain jurisdiction of the subject-matter, and an objection of this character is not waived by a general appearance. 12 Ency. of Pl. & Pr., p. 186; Way v. Way, 64 Ill. 406. * * *

(28) BARKER v. BARTH.

88 Ill. App. 27 (1899).

[Assumpsit on a promissory note. Opinion by Mr. Justice Adams.]

* * * To defendant's plea of set-off to the first count of the declaration, the plaintiff, by leave of court, replied double, in substance as follows:

1. That the defendant obtained the note described in his plea of [set-off] from McElwee & Carney, after he had notice that his note described in the declaration, and on which suit was brought, had been assigned by Barker to the Union National Bank for value.

2. That the defendant obtained the note of Barker [described in the plea of set-off] from McElwee & Carney after its maturity, and after his note on which this suit was brought had been assigned by Barker to the Union National Bank for value.

To these replications demurrers were sustained, when on motion of plaintiff's attorney, leave was given to the plaintiff to file additional counts to the declaration, instanter. It does not appear that the plaintiff elected to stand by his replications.

Counsel for plaintiff assume in their argument that the demurrers to these replications operate as admissions of the averments of the replications for all purposes, and supply the place of proof of such averments, including the averment that the defendant obtained the note pleaded as a

set-off after he had notice that the note sued on had been assigned by Barker to the Union National Bank.

This position can not be maintained. The general issue and special pleas of set-off were pleaded to the whole declaration, and the decision of the issues made to such pleas could be determined only by the evidence. Under our system of pleading, the defendant may plead as many pleas as he deems necessary for his defense, however inconsistent they may be, and an admission made by any one plea can not be used against him on an issue made by another plea. For instance, if defendant pleads the general issue and a special plea in confession and avoidance, the latter plea necessarily admits that the plaintiff has prima facie a cause of action; but the plaintiff can not use this admission as evidence, and must prove his case on the issue made by the plea of the general issue, as if there were no special plea. * * *

(29) PRIEST v. DODSWORTH.

235 Ill. 613; 85 N. E. 940 (1908).

Farmer, J. This was an action of assumpsit, brought by appellee (hereafter referred to as plaintiff) against the appellants (hereafter referred to as defendants), to recover the balance due on a promissory note given for the principal sum of $4,000. Plaintiff is a lawyer, and at the time the note was given was practicing his profession in Jacksonville, Ill., and the note, it is claimed by him, was given for services rendered at the time the note was given and to be thereafter rendered as attorney. The case was tried before the court without a jury, and resulted in a judgment in favor of the plaintiff for $1,895.56. Defendants prosecuted an appeal to the Appellate Court of the Third District, where the judgment of the circuit court was affirmed, and they have brought the case to this court by further appeal.

The trouble and litigation on account of which the note sued on was given was between members of a family, in-

volving a mother, her son, and her son's children, two of whom are defendants. It was a contest between the father and his children as to who should acquire and control the property of defendant's grandmother, who was quite aged and owned a large amount of property. The errors assigned in this court render it unnecessary for us to make any statement of the facts further than will appear from the pleadings. Defendants pleaded separately; J. R. Dodsworth filing three special pleas, and W. C. Dodsworth two. W. C. Dodsworth pleaded (1) that the note had been made and delivered to plaintiff by defendant J. R. Dodsworth before he (W. C. Dodsworth) signed it, and that there was therefore no consideration for it as to him; (2) that the note was signed by W. C. Dodsworth on the sole condition that it was to stand as security for the payment of a $500 note of J. R. Dodsworth to plaintiff. Issue was joined on these pleas. Defendant J. R. Dodsworth pleaded (1) failure of consideration for which the note was given; (2) set-off (this plea averred plaintiff was indebted to defendant in the sum of $3,700 for money before that time had and received by plaintiff for the use of defendant, which sum, the plea averred, exceeded the damages sustained by plaintiff, and that defendant was willing and offered to set off out of the said sum the full amount of plaintiff's damages); and (3) a plea of set-off. This plea averred defendant had been given by his grandmother notes of the value of $84,000; that he employed plaintiff, as his attorney, for the sum of $5,000, to conduct the defense of any suit or suits that might thereafter be brought against him for the purpose of depriving him of the said notes; that plaintiff undertook and agreed to do so, but, on the contrary, he neglected and refused to defend suits brought for the purpose of depriving defendant of said notes and negotiated a compromise of the controversy concerning them, which he induced the defendant to accept; and that plaintiff thereby so negligently and carelessly managed the business of defendant that $50,000 of said notes were lost to him, whereby he was damaged in that sum, which the plea offers to

set off against the plaintiff's demand. This plea is a lengthy one, setting out the history of the litigation instituted by defendant's father concerning the notes; but we have not deemed it necessary to give its substance in full. It is called and treated by both parties as a plea of set-off. The plaintiff, by leave of court, replied double to the pleas of both defendants. Issue was joined on the first and second pleas of J. R. Dodsworth, and replications were filed to the third plea. A demurrer to the fourteenth replication was carried back and sustained to said plea, and defendant abided by the plea. This replication was afterwards amended, so as to apply to the first plea of J. R. Dodsworth, and was filed as a replication to that plea. It is called in the record the fourteenth replication to J. R. Dodsworth's first plea.

It is contended by defendants that the court erred in sustaining the demurrer to the third plea of J. R. Dodsworth. We think the plea clearly bad. It proposed to set off an individual demand of J. R. Dodsworth against the joint demand of the plaintiff against J. R. Dodsworth and W. C. Dodsworth. This is not permissible. Demands, to be the subject-matter of set-off, must be mutual between all the parties to the action. Dameier v. Bayor, 167 Ill. 547, 47 N. E. 770; Ryan v. Barger, 16 Ill. 28; 19 Ency. of Pl. & Pr. 757. Defendants say the note was not signed by W. C. Dodsworth until after it was made and delivered to plaintiff by J. R. Dodsworth; that W. C. Dodsworth was not indebted to the plaintiff at the time he signed the note, but signed it as surety. The plea contains no such averments. It proposed to set off an individual demand against a joint demand. It does not propose to set off in an action against the principal and surety a demand held by the principal against the plaintiff. The plea is not aided by the fact that W. C. Dodsworth pleaded that he had signed the note as surety. It is a well-settled rule of pleading that each plea must be complete in itself and form a distinct issue. Farnan v. Childs, 66 Ill. 544.

On the trial defendants asked and were permitted by the

court to open and close the case, both in the introduction of testimony and in the argument. The court held in propositions of law, at plaintiff's request, that the burden was on defendants to prove their pleas by a preponderance of the evidence; and this it is claimed was error. It is admitted this is the general rule as to affirmative pleas, but counsel contend that the rule is not applicable in a suit between an attorney and client; that in such cases, on account of the fiduciary relation between the parties, the burden is on the plaintiff to disprove the pleas by a preponderance of the evidence. Undoubtedly the rule is as contended for by defendants, where the controversy relates to the good faith or fraudulent conduct and practices of an attorney in using his position to secure property of his client or in taking some advantage of him. No such question is raised by the pleadings in this case. There is no denial on the part of defendants that they signed the note, nor that they knew what they were doing and what they were signing at the time they signed it. The rule contended for by defendants as to where the burden of proof lies in litigation between attorney and client is not of universal application. In a suit by a client against his attorney for damages charged to have resulted from the negligent management of business, the burden is on the plaintiff to prove the negligence charged. "There is no presumption that an attorney has been guilty of a want of care, arising merely from his failure to be successful in an undertaking. On the contrary, he is always entitled to the benefit of the rule that every one is presumed to have discharged his duty, whether legal or moral, until the contrary is made to appear. In a suit against an attorney for negligence, the burden is therefore on the plaintiff to allege and prove every fact essential to establish defendant's duty and a violation of it." 3 Am. & Eng. Ency. of Law (2d Ed.) 384. "In a suit by a client against an attorney for negligence in conducting the collection of a claim, whereby the debt was lost, the burden rests on the former to allege and prove every fact essential to establish such liability. He must allege and prove that

the claim was turned over to the attorney for collection, that there was a failure to collect, that this failure was due to the culpable neglect of the attorney, and that but for such negligence the debt could or would have been collected." Id. 391. Pennington's Ex'rs v. Yell, 11 Ark 212, 52 Am. Dec. 262, was a suit against an attorney by a client, charging him with negligently failing to collect a claim placed in his hands for collection, and it was held the charge must be affirmatively proven, and that the claim was a valid, subsisting claim against a solvent party. In 2 Greenleaf on Evidence, § 148, the author, in discussing actions by clients against attorneys for damages resulting from the attorney's negligence in failing to collect a claim placed in his hands for that purpose, says: "In short, the plaintiff has to show that he had a valid claim, which has been impaired or lost by the negligence or misconduct of the defendant." These principles are applicable to the issues made by the pleadings in this case, and we are of opinion the court did not err in holding as law the propositions complained of.

It is contended that the court erred in overruling the demurrer of defendants to the fourteenth replication, as amended, to the first plea of J. R. Dodsworth. This, as we have said, was a plea of failure of consideration. In substance, it averred that the consideration for the note was the agreement of plaintiff that he would successfully defend and maintain defendant's (J. R. Dodworth's) title to and possession of $84,000 in notes given him by his grandmother, and that if he (plaintiff) failed to do this he would return to said defendant said note; that, by reason of the timidity, negligence, and carelessness of plaintiff in maintaining said defendant's rights, defendant lost title to and possession of notes of the value of $69,000, whereby the consideration for the note sued on wholly failed. By the amended fourteenth replication plaintiff denied that the consideration for the note failed, as alleged in the plea, and denied that it was to be returned if he failed to successfully defend J. R. Dodsworth's title to the notes. It also set out with much detail

the history of the trouble between the members of the Dodsworth family, the litigation growing out of it, the employment of plaintiff, the circumstances attending the giving of the note, and the purposes for which it was given, and the services rendered by the plaintiff in the controversy. It also sets out with much particularity a compromise of all controversies between the parties, effected by plaintiff, and consented and agreed to by J. R. and W. C. Dodsworth and their sister, Prudence, by which they obtained title to about $90,000 worth of their grandmother's property.

The demurrer to this replication, we think, should have been sustained. It is both a traverse and a confession and avoidance. The issue tendered by the plea was that plaintiff failed to keep and perform his agreement to successfully defend J. R. Dodsworth's title to the notes, but negligently and carelessly failed in this regard, whereby the consideration for the note in suit failed. If the replication had admitted that the consideration for the note was the agreement set out in the plea, and sought to avoid it by setting up a compromise and settlement of the litigation by mutual agreement between the parties, the facts, or some of them, alleged in the replication would have been proper; but as the replication denies that the consideration for the note was as averred in the plea, and denies that it failed, the averments as to the compromise of the controversy between the parties, and of plaintiff's services therein, meet no issue tendered by the plea. A party may file as many pleas or replications as he chooses, and they may be inconsistent with each other; but each pleading must be complete and consistent with itself, and must answer the pleading it is intended as an answer to. If it is desired to put in issue the truth of the allegations of a plea, this is done by a denial of them, called a "traverse." If this is not desired, but it is desired to set up matter in justification or in excuse, this must be done by way of confession and avoidance. While the plaintiff may in one replication traverse a plea and in another confess and avoid, the two

defenses are repugnant, and cannot be embraced in the same replication. Stephen's Pl. 137; 1 Chitty's Pl. 623; 1 Tidd's Pr. 684. The necessity for this rule of pleading and its observance is manifest, for the reason that evidence may be admissible under a traverse that would be incompetent under a confession and avoidance, and vice versa.

We are of opinion the circuit court erred in overruling the demurrer to the fourteenth replication to the first plea of J. R. Dodsworth. The judgment of the circuit court, and of the Appellate Court, affirming the judgment of the circuit court, will therefore be reversed, and the cause remanded to the circuit court.

Reversed and remanded.

NOTE: ILLINOIS PRACTICE ACT OF 1907.
Hurd's Statutes (1908) p. 1625.

§ 46. The defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense, or may plead the general issue, and give notice in writing under the same, of the special matters intended to be relied on for a defense on the trial; in which notice the special matters so intended to be relied on shall be clearly and explicitly stated; and under which notice, if adjudged by the court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon.

* * * * * * *

§ 51. Whenever it shall become necessary, for the attainment of justice, to allow a plaintiff to reply several matters to the plea of a defendant, or to allow a defendant to rejoin several matters to the replication of a plaintiff, the court in which the action shall be pending, on the special application of the party desiring so to reply or rejoin, may allow the same to be done.

(30) KINNEY v. TURNER.

15 Ill. 182 (1853).

The fourth plea is a plea of total failure of consideration. It is that, at the giving of the note [upon which the suit was brought], the plaintiff represented that he had the exclusive right to Page's portable saw-mill, and agreed to convey the same (that is, said exclusive right) to defendants by deed of warranty, in consideration of which defendant executed the note. The plea then avers that said plaintiff did not convey said exclusive right, and that he did not possess it. The plea is demurred to on the ground of duplicity. The plaintiff's counsel say that the plea should have been confined to the averment, either that the plaintiff did not convey by warranty deed or that he had no title to the patent right.

Scates, J. The objection taken to the fourth plea in this case on special demurrer was for duplicity. The plea alleged the consideration of the note sued on to be the agreement of the defendant [plaintiff] to convey by warranty deed to them, and two others impleaded with them, the free, full and exclusive right of using and running in a certain township Page's portable saw-mill, which he represented to them that he owned; and that the consideration wholly failed, in this, that he had no title or right to the exclusive use of said saw-mill in said township, and did not convey the same to them by warranty deed. We are of opinion the court erred in sustaining the demurrer to this plea for duplicity.

The pleader may set forth any number of facts and circumstances, which taken together, constitute but one cause of action or defense in one count, plea or replication. Stephen on Pl. 263. And by parity so he may, even must, in averring the consideration, truly set forth every fact, circumstance or inducement which entered into and formed a part of it, otherwise, instead of showing the whole, he would only show a part; and being confined in his proofs to his allegations, he must fail. So, in pleading a total

failure of consideration, he must set forth every distinct element entering into it—and then as distinctly aver a failure of each and all the parts of it—else the plea would be bad as a plea of total failure. A good illustration is found in the case of Sullivan v. Dollins, 12 Ill. R. 85, where the consideration consisted of several distinct matters The difficulty in this case, we presume, arises from the character and nature of the defense of a total failure of consideration of parts, or many things, each and all must be shown to exhibit the consideration as a unit—and where it consisted of parts, or many things. each and all must be shown to have failed; it is not so in pleading a partial failure. * * *

(31) CHICAGO & PACIFIC R. R. CO. v. MUNGER.
78 Ill. 301 (1875).

[Opinion by Mr. Justice Scholfield.]

Suit was brought by appellee against appellant on a promissory note executed by it to her on the 4th of January, 1875, payable thirty days after date, for $1,057.03, with interest thereon at the rate of ten per cent per annum.

Appellant pleaded this plea, verified by affidavit:

"And the said defendant, said Chicago and Pacific Railroad Company, by Chas. D. F. Smith, its attorney, comes and defends the wrong and injury, when, etc., and says that the said plaintiff, before and at the time of the commencement of this suit was, and still is, an insane person, and as an insane person, then was, and still is, confined in an hospital for the insane at Batavia, in said State of Illinois, to wit, at said Cook county. And this the said defendant is ready to verify; wherefore it prays judgment of the plaintiff's said writ, and that the same may be quashed."

Appellee demurred and the court sustained the demurrer and gave judgment for appellee. The only question is, was the plea good, in law?

The note was due and unpaid, and somebody was entitled to sue upon it and enforce its collection. If appellee was not, who was? It is requisite that a plea in abatement shall

give the plaintiff a better writ or declaration—the meaning of which, says Stephen, "is, that in pleading a mistake of form in abatement of the writ or declaration, the plea must at the same time correct the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ or declaration." Stephen on Pleading (Heard's Ed.), 461.

Chitty says: "In the case of a lunatic, the action upon a contract made with him should be brought in his name, not in the name of his committee." 1st Plead. (7th Am. Ed.), 20.

By our statute the conservator of a lunatic shall demand, "sue for and receive in his own name, as conservator, all personal property of and demands due the ward," etc. R. L. 1874, Chap. 86, Sec. 11. But until the appointment and qualification of the conservator, it is clear, suit is properly brought in the name of the lunatic.

(32) WILLARD v. ZEHR.

215 Ill. 154; 74 N. E. 107 (1905).

At the December term, 1903, of the Circuit Court of Tazewell county, defendant in error began an action of trespass on the case for the breach of warranty of a breeding jack sold to him by plaintiff in error. At the time the suit was commenced the plaintiff in error was a resident of Jasper county, State of Missouri, and had been indicted by the grand jury of Tazewell county for horse stealing, and had been brought into that county by the sheriff, and while in the county to answer the indictment was served with process in this case. To the declaration the defendant filed the following plea in abatement: "And the said A. H. Willard, in his own proper person, comes and defends," etc., "and says that he is the only defendant in this cause, and that the cause of action herein is not a local action, and that before and at the time of the commencement of said action of the said Christ. Zehr against him, and at the time of the service of process upon him in said cause, he, the

said A. H. Willard, was, and from thence hitherto has been and still is, residing in the county of Jasper, in the State of Missouri, and not in the county of Tazewell and State of Illinois, and that at the time of the service of process upon him in this cause he was not voluntarily within the said county of Tazewell and State of Illinois, but was then and there under arrest and in the custody of the sheriff of said county of Tazewell, and had been brought from his home, in the county of Jasper and State of Missouri, where he then resided and now resides, under arrest on a capias issued out of the office of the clerk of the Circuit Court of the county of Tazewell upon an indictment wrongfully, fraudulently, deceitfully and designedly procured to be returned by the grand jury of the county of Tazewell and State of Illinois, charging him, the said A. H Willard, with the larceny of certain horses from one James Dean, in this county of Tazewell; and the said defendant avers that the said indictment was wrongfully, fraudulently, deceitfully and designedly procured to be returned by the said grand jury of said Tazewell county by the wrongful, unlawful, fraudulent and deceitful connivance, procurement, assistance, direction, counsel, aiding and abetting of said plaintiff herein, Christ. Zehr, and one W. H. Miner, and the above named James Dean, and their agents, servants and certain attorneys, which certain attorneys referred to then represented the plaintiff in this cause, and still do, and then did and still do represent the other plaintiffs in said other causes, for the wrongful, unlawful, fraudulent and deceitful purpose of bringing the person of the said A. H. Willard into the said county of Tazewell, in the state aforesaid, within the jurisdiction of said court, for the wrongful, fraudulent and deceitful purpose of procuring and causing the said process in this cause and in another cause then pending in said court against the said defendant, A. H. Willard, wherein the said W. H. Miner was plaintiff, to be served upon the said defendant, A. H. Willard, thereby attempting to secure jurisdiction over the defendant in said causes in this county of Tazewell, and that pursuant to and

in furtherance of said wrongful, fraudulent and deceitful purpose, and while the said defendant, A. H. Willard, was so wrongfully, fraudulently and deceitfully under arrest upon said capias issued upon said indictment as aforesaid, and in the custody of the sheriff of said county of Tazewell, as aforesaid, and while so wrongfully, fraudulently and deceitfully held and detained in the said county of Tazewell, as aforesaid, the said summons in said cause was served upon the said defendant, A. H. Willard, and that subsequent to the procuring of the said indictment to be returned into said court, and after the said service of process upon the said defendant, while he was so under arrest and in custody of the sheriff of the said county of Tazewell pursuant to said wrongful, fraudulent and deceitful purpose, as aforesaid, the said Christ. Zehr, plaintiff herein, and the said W. H. Miner and James Dean, by, with and through the advice and counsel of their same attorneys, caused the said indictment to be dismissed out of this court. And the said defendant further avers that at and within the said county of Jasper, in the State of Missouri, where the said defendant, A. H. Willard, heretofore and now resides, there is a Circuit Court which has jurisdiction of the person of the said defendant, and which may lawfully have and take cognizance of the aforesaid action, and this he, the said defendant, A. H. Willard, is ready to verify, wherefore he prays judgment if the court will take cognizance of the aforesaid action." To this plea a general and special demurrer was sustained, and, defendant electing to stand by his demurrer, a judgment was rendered against him for $955.75. An appeal was prosecuted to the Appellate Court, where the judgment was affirmed, to reverse which this writ of error has been sued out.

Wilkin, J. A motion has been made by the defendant in error to dismiss the writ on the ground that the judgment does not exceed $1,000, and that, as there is no certificate of importance from the Appellate Court, the judgment of that court is final. Section 8 of chapter 37 (Hurd's Rev. St. 1903, p. 569), with reference to the juris-

diction of the Appellate Court, provides that, in all cases where there was no trial on an issue of fact in the lower court, appeals and writs of error shall lie from the Appellate Court to the Supreme Court, where the amount claimed in the pleadings exceeds $1,000. We have held that the issue of fact referred to in this section means an issue of fact made under our practice in courts of record by the formal written pleadings of the parties; that is, a single, certain, material point arising out of the allegations of the parties, and generally made by an affirmative allegation and denial. Whenever the parties come to a point in the pleadings which is affirmed on one side and denied on the other, they are said to be at an issue; and, when a material fact is thus affirmed and denied, an issue of fact is formed for trial, and its determination usually results in a judgment for one party or the other. In this way only, as a general rule, can an issue of fact be formed for trial. Washington v. Louisville & Nashville Railway Co., 136 Ill. 49, 26 N. E. 653; Gottfried v. Woodruff, 193 Ill. 491, 61 N. E. 1066; Gould's Pl. 279. Under this definition, no issue of fact was tried by the lower court. There was a demurrer to the plea, which was sustained; and, defendant electing to stand by his demurrer, judgment was entered by default for $955.75. The amount claimed in the declaration was $1,500, and therefore an appeal lies to this court. Murphy v. Murphy, 207 Ill. 250, 69 N. E. 966. The motion to dismiss will accordingly be denied.

The question next presented for our decision is as to the sufficiency of the plea. The suit was commenced in a court of general jurisdiction. The rule is that any defect in a writ, its service or return, which is apparent from an inspection of the record, may properly be taken advantage of by a motion, but where the objection is founded upon extrinsic facts the matter must be pleaded in abatement, so that an issue may be made and tried by a jury like any other issue of fact. Greer v. Young, 120 Ill. 194, 11 N. E. 167.

Section 2 of chapter 110 (Hurd's Rev. St. 1903, p. 1400) provides that it shall not be lawful for any plaintiff to sue

any defendant out of the county where the latter resides "or may be found," except in certain cases therein specified, not material to be considered here. The defendant was found and duly served in Tazewell county, and we have held that unless he was there by reason of some fraud, artifice or trick on the part of the plaintiff, or some one acting for him, in order to obtain service upon him, he was properly found within that county, within the meaning of the statute. Cassem v. Galvin, 158 Ill. 30, 41 N. E. 1087; Greer v. Young, supra; McNab v. Bennett, 66 Ill. 157.

As the Circuit Court of Tazewell County is one of general jurisdiction, and the want of jurisdiction did not appear upon the face of the record, it could only be raised by a plea in abatement, as above stated. The law has always required great accuracy and precision in the structure and form of such pleas. They must be certain to every intent, and, if to the jurisdiction of the court, there must be proper averments of facts, accurately and logically stated, excluding every intendment of jurisdiction. The presumption will be in favor of the jurisdiction, and the pleader must set up such facts as would clearly oust the court of jurisdiction. Presumptions, deductions, arguments, inferences and conclusions are not sufficient. Parsons v. Case. 45 Ill. 296; Diblee v. Davison, 25 Ill. 486; Humphrey v. Phillips, 57 Ill. 132; 1 Chitty's Pl., 395. Does the plea aver that the defendant was not found in Tazewell county, within this rule of pleading? We think not. True, it states with certainty and definiteness that he was a resident of Jasper county, State of Missouri, and that he was not at the time he was served voluntarily in said Tazewell county, but was there under arrest, and had been brought from his home in Missouri under arrest upon a capias issued out of the county of Tazewell; but these facts were not sufficient to exempt him from service of summons in the county in which he was in fact found. McNab v. Bennett, supra; Cassem v. Galvin, supra; Greer v. Young, supra; Brewster v. Scarborough, 2 Scam. 280; Semple v. Anderson, 4 Gilman, 546. He was required to go further, and show that he was not

properly charged with the crime for which he was arrested and brought into the said county. This he attempted to do by subsequent averments that the indictment charging him with larceny of the horse was "wrongfully, fraudulently, deceitfully and designedly procured" to be returned by the grand jury by the "wrongful, unlawful, fraudulent and deceitful connivance, procurement, assistance, direction, counsel, aiding and abetting of said plaintiff," etc., for the purpose of bringing him into the said county, within the jurisdiction of said court, etc., and that after the service upon him they caused said indictment to be dismissed out of court. It will be seen that the averment that the indictment was "wrongfully, fraudulently, deceitfully and designedly procured" rests upon no alleged fact as to the acts and conduct of the plaintiff. Unaided by presumptions, arguments, inferences and conclusions, it amounts to nothing in a plea to the jurisdiction of the court, and is no more than the conclusion of the pleader. There is in the plea no averment that the defendant was not guilty of the crime charged in the indictment upon which he was arrested, or that the plaintiff, and those with whom he is charged to have acted, appeared before the grand jury, or caused others to do so, and there falsely charged him with the crime.

Counsel for the plaintiff in error say that an indictment against the defendant in error and those with whom he acted, charging them with conspiracy to do an illegal act, or an act in an unlawful manner, alleging the offense in the language of this plea, would be sufficient. Even if that should be admitted, it does not follow that the plea is sufficient to oust a court of general jurisdiction of the power to try a defendant found and served with process within its territorial jurisdiction. We concede that it is never necessary for a party to plead the evidence of facts averred, but enough of the facts themselves relied upon as sustaining the cause of action or defense must be alleged to enable the court to determine their sufficiency.

It is also urged that the objections to the plea could only

be raised by special demurrer, and that the particular grounds assigned were insufficient. The objections above pointed out go to the substance of the plea, and certainly could be reached by general demurrer. In fact, the general rule is that all objections to pleas of this kind, whether of form or substance, can be raised by a general demurrer. Finch v. Galigher, 181 Ill. 625, 54 N. E. 611.

The Circuit Court did not err in sustaining the plaintiff's demurrer to the plea, and the Appellate Court properly affirmed the judgment.

Judgment affirmed.

(33) KEOKUK & HAMILTON BRIDGE CO. v. WETZEL.

228 Ill. 253; 81 N. E. 864 (1907).

Hand, C. J. This was an action on the case commenced in the circuit court of Hancock county by the appellee, against the appellant, to recover damages for a personal injury alleged to have been sustained by the appellee by being thrown from a spring seat upon a farm wagon upon which he was seated, while riding across the bridge of appellant, in consequence of certain obstructions averred to have been negligently placed by appellant upon or near the wagonway upon the bridge of appellant, with which obstructions the wheel of the wagon upon which appellee was riding came in contact as it was being drawn across said bridge by a span of horses. The declaration contained two counts, to which the appellant filed the general issue and a plea of nul tiel corporation. The court struck the plea of nul tiel corporation from the files upon the motion of appellee, and upon the trial the jury returned a verdict in favor of the appellee for the sum of $1,575, upon which the court, after overruling a motion for a new trial, rendered judgment, which judgment, upon appeal, has been affirmed by the Appellate Court for the Third District, and a further appeal has been prosecuted to this court.

The evidence of the appellee fairly tended to show that the appellant was in possession and control of a foot,

wagon, and railroad bridge across the Mississippi river, between Keokuk, in the state of Iowa, and Hamilton, in the state of Illinois; that on the evening of August 7, 1902, the appellee, in company with one Charles Williams, was returning from Keokuk to Hamilton over said bridge with a team and farm wagon; that they were seated upon a spring seat upon the top box of the wagon; that as they neared the Illinois end of the bridge the right front wheel of the wagon came in contact with certain planks which were left by the workmen of appellant, who were repairing said bridge, upon or near the wagonway, and in consequence of the contact of the wheel of the wagon with said planks appellee was thrown from his seat upon the wagon to and upon the wagonway of said bridge, and he was seriously injured. The summons was served upon W. H. Alberton, station agent of appellant; its president not being found in Hamilton county. Appellant appeared and filed a petition for a change of venue, and, the prayer of the petition having been denied, appellant filed said pleas of the general issue and nul tiel corporation. The appellant made no motion for a directed verdict. Hence no question arises on this record as to the sufficiency of the evidence to sustain the cause of action stated in the appellee's declaration, and no question is raised upon the admission or rejection of evidence.

The first contention of the appellant is that the court erred in striking the plea of nul tiel corporation from the files. The correct disposition of that contention involves a determination of the question whether the plea of nul tiel corporation defendant is a plea in abatement or a plea in bar. If such plea is a plea in abatement, after the motion for a change of venue had been made and overruled, and the general issue filed, it was made too late and was properly stricken from the files. Union Nat. Bank of Chicago v. First Nat. Bank of Centreville, 90 Ill. 56. If, however, it should be treated as a plea in bar, it was filed in apt time, and it was error to strike it from the files. There is some apparent confusion in the reported decisions on this question. We

think, however, upon principle and authority, a plea denying that the plaintiff is now or ever has been a corporation is a plea in bar, as the sustaining of such plea would defeat the action. It would seem, however, that when a defendant files a plea in which it denies it is now or ever has been a corporation, it should give the plaintiff a better writ by pointing out to him its true character—that is, whether it is a joint stock company, a partnership, or other aggregation of individuals—to the end that the plaintiff may amend and thereby avoid the abatement of his action, and that such plea is a plea in abatement. Mr. Chitty, in his work on Pleading (volume 1, p. 446), says: "Whenever the subject-matter of the plea of the defense is that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding and does not show that the plaintiff is forever concluded should, in general, be pleaded in abatement." Applying the principle thus announced to the case at bar, the defendant should have pleaded nul tiel corporation defendant in abatement, and not in bar of the action. It is said in 10 Cyc. p. 1361: "The plea of nul tiel corporation defendant should not only deny in positive terms that defendant is a corporation, but it should state what defendant is, or who the defendants are. In other words, in the technical language of common-law pleading, it should 'give the plaintiff a better writ.'" In American Express Co. v. Haggard, 37 Ill. 465, 87 Am. Dec. 257, suit was brought by Haggard against the American Express Company for a failure to deliver to him an express package containing $170.30. The company was sued as a corporation, and service was had upon its agent at Bloomington. The agent came into court, and, without denying his agency, filed an affidavit denying "he was the agent of such a corporation," and saying "he knew of no such corporation," and moved to quash the return. In disposing of that motion, the court said: "The object of the affidavit was to raise the question as to whether the defendant was a cor-

poration, and as this was matter dehors the record the question was one to be presented by plea in abatement, and not by motion." After the motion was overruled, the counsel for the American Express Company filed a plea in abatement in the name of "Johnston Livingston, William G. Fargo, Henry Wells, and others, admitting that they, 'together with others,' are doing business under the name of the American Express Company, but denying that said company is now or ever has been a corporation." The court said: "A demurrer was sustained to this plea, and properly. It is defective in not giving the plaintiff a better writ. 1 Chitty, 446. It should have set forth who were the 'others' with whom Livingston, Fargo, and Wells say they are doing business under the name of the American Express Company, in order that the plaintiff might know against whom to bring his suit, if the plea should prove to be true."

The plea filed recites: "Now comes the defendant, by D. E. Mack and G. Edmunds, attorneys, and for first plea in this behalf says that there is no such corporation as the Keokuk & Hamilton Bridge Company"—by the terms of which plea the Keokuk and Hamilton Bridge Company, defendant, appears, and being present it pleads in bar that it does not exist. Such a plea is inappropriate and inconsistent when it is filed with a plea of general issue. While a defendant may plead by separate pleas inconsistent defenses, it may not take inconsistent positions in the same plea. In McCullough v. Talladega Ins. Co., 46 Ala. 377, the court say: "This suit was assumpsit on a written contract or obligation to pay money, brought by the appellant against the appellee. The defendant pleaded the general issue and nul tiel corporation. The court erred in not sustaining the demurrer to the last plea. I have not been able to find any authority for such a use of the last plea by the corporation." In President and Trustees of Town of Connersville v. Wadleigh, 6 Blackf. (Ind.) 297, 298, the court say: "'The president and trustees of the town of Connersville say there are no such persons as the

president and trustees of the town of Connersville.' The admission in one part of the plea destroys the effect of the denial in the other." And in Oxford Iron Co. v. Spradley, 46 Ala. 107, the court say: "The plea of nul tiel corporation, where a defendant is sued as a corporation aggregate, is an inappropriate plea and an inconsistency in itself.

We find no precedent for such a plea in such a case, nor any case in which it has been pleaded. The appointment of an attorney, and an appearance by him for the defendant, is an admission on the record that the defendant is a corporation." In Faust v. Southern Railway Co., 54 S. E. 566, 74 S. C. 360, the court say: "When a defendant is sued as a corporation and appears and answers as such to the merits, defendant's corporate existence stands admitted." If the appellant desired to contest its corporate existence, it should have done so in apt time by a plea in abatement, and having failed to do so, the trial court did not err in striking its plea of nul tiel corporation defendant from the files. * * *

(34). SPENCER v. AETNA INDEMNITY CO.

231 Ill. 82; 83 N. E. 102 (1907).

Farmer, J. Julia M. Cooney recovered a judgment against the United States Wringer Company in the superior court of Cook county for $5,210. The defendant in that case appealed to the Appellate Court, where the judgment of the superior court was affirmed, and from the judgment of the Appellate Court it prosecuted an appeal to this court. The judgment of the Appellate Court was affirmed by this court (214 Ill. 520), and, not having been paid, plaintiff in said judgment began suit on the appeal bond given in the Appellate Court upon allowance of the appeal to this court. The suit was begun and declaration filed on May 5, 1905. On the 16th of May, 1905, the declaration was amended by inserting after the name of Julia M. Cooney, plaintiff, wherever it occurred, the words, "for the use of Charles C. Spencer." Service was

had only upon appellant, the Aetna Indemnity Company, the surety on the bond. On the 22d of May appellant pleaded in abatement that on the same day the suit was begun, but prior to its commencement, the United States Wringer Company instituted an attachment suit against Julia M. Cooney in the common pleas court in Franklin county, Ohio, that appellant was made defendant to said suit as garnishee, and that it was sought in said suit to attach the same indebtedness as that for which the action to which the plea was filed was brought. The plea was verified by an affidavit, in which the affiant stated the affidavit was true "to the best of his knowledge and belief." On the 27th of May appellant, by leave of court, filed an amended plea nunc pro tunc as of May 22d. The amended plea was the same as the original plea, except that the affidavit stated the plea was "true in substance and in fact." On the same day this amended plea was filed appellee moved to strike both the original and amended pleas from the files. This motion was overruled and appellee excepted. Subsequently appellee demurred to the plea and the court sustained the demurrer. Appellant asked and was given leave to amend, and on the 13th of June filed an amended plea setting up the same matters, but more in detail, set out in the plea to which the demurrer was sustained. Appellee moved to strike this plea from the files, but the court overruled the motion, and appellee excepted. Afterwards the appellee demurred to the amended plea. The court sustained the demurrer, and appellant electing to stand by its plea, judgment was entered against it for $6,000 debt and $5,938.82 damages. This judgment was rendered February 13, 1906, and Julia M. Cooney died February 23, 1906. Thereafter, and within the time allowed for filling an appeal bond, and before the same was filed, appellee suggested the death of Julia M. Cooney of record. Appellant thereupon moved for a rule upon appellee to show by what authority he had used the name of Julia M. Cooney as the nominal plaintiff. This motion was denied, and the appeal bond made to appellee,

the beneficial plaintiff. Appellant filed its bond and perfected its appeal from the judgment of the circuit court to the Appellate Court. The Appellate Court affirmed the judgment of the circuit court, and from the judgment of affirmance appellant has prosecuted this appeal to this court.

Appellant has filed an able and exhaustive brief in support of the proposition that the matter set up in its amended plea is proper to be pleaded in abatement, and that the court erred in sustaining the demurrer thereto. We do not think the merits of that question necessary to a determination of this case. It is not denied that the first plea filed was defective because improperly verified. Appellant's counsel say in their brief: "The principal questions upon this appeal relate to the sufficiency of the amended plea in abatement of defendant, the Aetna Indemnity Company, and to the propriety of the rulings of the court with reference to the appeal bond." By obtaining leave to file, and filing, an amended plea, appellant waived the right to question the correctness of the ruling of the court in holding the former plea insufficient.

The question then arises whether the law authorized the filing of the amended plea. Appellee moved the court to strike the plea from the files, and on its motion being overruled filed a demurrer, which was sustained. If the plea did not belong to the class of so-called pleas in abatement, which are amendable, leave should not have been granted to file it, or the court should afterwards have allowed the motion to strike it from the files. Neither of these methods was resorted to by the court, but the plea was disposed of on demurrer.

Appellant insists appellee's contention that the trial court erred in granting leave to amend the plea is not presented by this record for consideration, for the reason that appellee has assigned no cross-errors. On this question we agree with the Appellate Court. That court said: "We are unable to concur in the suggestion of appellant's counsel that this question is not before us because cross-

errors are not assigned. Appellant is here asking us to set aside a judgment against it. If the judgment is correct upon the record, it must stand, and it is no reason for setting it aside that the trial court, before reaching its final judgment, may have erred in appellant's favor and erroneously denied a motion to strike out the amended plea. In Indianapolis, Peru & Chicago Railway Co. v. Summers, 28 Ind. 521-523, where the lower court had sustained a demurrer to a plea in abatement, it was said: 'The proper practice where the plea is filed without being verified would be to move to reject or strike it from the record, but as the proper result was reached in the case at bar the case should not be reversed because of the error in the mode.'" The rule is that pleas in abatement are not amendable. Hurd's Rev. St. 1905, c. 7, § 11; Bacon v. Schepflin, 185 Ill. 122, 56 N. E. 1123; Cook v. Yardwood, 41 Ill. 115; Trinder v. Durant, 5 Wend. (N. Y.) 73; 1 Chitty's Pl. 465; 1 Tidd's Pr. § 638. To this general rule an exception is made in the case of pleas in abatement to the jurisdiction of the court of the person. A plea of this character is held to be not strictly a plea in abatement, but a meritorious plea necessary to the protection of a substantial right granted by statute, and in such case the plea is amendable. Safford v. Sangamo Ins. Co., 88 Ill. 296; Drake v. Drake, 83 Ill. 526; Humphrey v. Phillips, 57 Ill. 132; Midland Pacific Railway Co. v. McDermid, 91 Ill. 170. Appellant had no right to file the amended plea, and should not have been granted leave to do so. It had no right to have the plea considered as setting up any defense to the action, and the judgment of the court in refusing to treat it as a valid plea was correct, notwithstanding that judgment may have been reached through an erroneous process of reasoning. * * *

NOTE: ILLINOIS PRACTICE ACT OF 1907.

Hurd's Statutes (1908) p. 1625.

§ 45. If the issue in any plea in abatement is the truth of a statement in the return on the summons, or that the defendant is sued out of his proper county, or is not sub-

ject to suit in the county in which the suit is brought, or that the court has no jurisdiction over the person of the defendant, and such issue is found against the defendant, the judgment shall be respondeat ouster.

(35) WILSON v. KING.
83 Ill. 235 (1876).

[Assumpsit on four promissory notes. Special and common counts. Opinion by Mr. Justice Walker.]

* * * After the jury had been empanelled and before any evidence was heard, appellee entered a nolle prosequi to the special counts of his declaration. Appellants then asked leave until the next morning to amend their pleas. This was refused by the court and leave was given to amend instanter, but defendants declined to avail of the leave, and the trial thereupon progressed to its conclusion.

The special counts were on four promissory notes, given by defendants to Henry W. King & Co., and assigned to appellee, and defendants pleaded partial failure of consideration to the notes described in the special counts. When they [the special counts] were stricken out, these pleas, of course, became inapplicable as a defense to the common counts, and hence the necessity of amending the pleas, so as to present the defense under the common counts; and the court must have seen that it would require but a few minutes for any attorney to amend the pleas so as to be applicable to the common counts. The amendment, as all know, could have been made so as not to delay the trial. This being so, the court, in the exercise of its discretion, allowed the leave to amend, if it had been accepted, on just and reasonable terms under the statute.

It is next urged that the court below erred in admitting the notes in evidence under the common counts, without proof of their execution and assignment. It is true that appellant interposed a general objection to their being read but did not specify this or any other particular objection.

This court has repeatedly and uniformly held that the objection here urged must be insisted upon in the court below; that fair practice requires that the objection must be pointed out, that the other party may have the opportunity to remove it; and if not specially made, the general objection will be regarded as only going to the materiality of the evidence under the issue. The adjudications of this court announcing this rule run through the entire series of our reports, and must be familiar to the entire profession, hence we deem it unnecessary to otherwise refer to or cite them.

After the notes were introduced in evidence, one of appellants offered to prove, by his own testimony, that the notes were given for a quantity of clothing purchased of Henry W. King & Co.; that they, when the sale was made, warranted the clothing to have been made of good material, and that they were well made; that the warranty had failed because the material was not good nor was the clothing well made, and the consideration had, in part, failed, as the goods were of less value than the price agreed to be paid. But the court refused to permit him to make the proof.

It is urged that a partial failure of consideration could not be given in evidence under the general issue to the common counts. The cases of Rose v. Mortimer, 17 Ill. 475; Keith v. Mafit, 38 Ill. 303 and Leggat v. Sands, 60 Ill. 163, are referred to in support of the proposition. On reference to these cases, it will be observed that they were all actions on promissory notes, which were described in special counts.

Those cases were strictly in accordance with the ninth section of the chapter entitled "Negotiable Instruments." It provides that where a suit is brought on any note, bond, bill or other instrument in writing, for the payment of money or property, etc., the maker may plead the want of consideration, or the entire or partial failure of consideration, as a defense to such action. According to the provisions of this section, when an action is on such an instru-

ment, to be available such a defense must be pleaded—and these cases so hold. But when the suit is not brought on such an instrument, but the common counts are used, and such an instrument is read in evidence to sustain the money counts, must the same rule of practice prevail? If so, then the plaintiff may gain a decided advantage over the defendant by only pleading such counts, or special and common counts, and entering a nolle prosequi, as was done in this case.

The rights of the parties should be mutual. If the note may be read in evidence under the common counts, the defense of a want or a total or partial failure of consideration should in such case be allowed under the general issue. Where the declaration counts on such an instrument, the defense, of course, must be made by plea; or even where the declaration only contains the common counts, and the plaintiff files a copy of the instrument therewith, and a written statement that no other evidence than the instrument of which a copy is filed will be offered on the trial, then a plea should be required.

When a suit is brought on such an instrument in writing it is usual to add the appropriate common counts to avoid the effects of a variance. Suppose, in such a case, the instrument is excluded under the special counts on the trial, and the instrument is read under the common counts, shall the defendant be deprived of the defense which the statute intended to secure to him, when it exists against the instrument, because the court shall, in the exercise of a discretion, refuse to stop the trial, and permit the defendant to amend his plea to the special count or plead anew? Or suppose the plaintiff should only file the common counts, without a copy of the note intended to be read in evidence, and on the trial should read the note in evidence, could a plaintiff thus deprive a defendant of such a defense? If so, such a practice would operate with great hardship upon defendants having meritorious defenses of this character. Neither party should be permitted to obtain an unfair advantage of the other. All rules should be so applied as to

promote instead of obstructing justice. Such is the object of all rules of practice adopted by courts.

If it be said that to permit the defendant to make this defense under the general issue, when the note is read in evidence under the common counts, would lead to surprise on the part of the plaintiff, the same would be true of the defendant when he has no notice by a special count, describing the instrument relied upon for recovery. Again, the plaintiff can always avoid a surprise by declaring specially, thus giving the defendant a fair opportunity of presenting his defense. But if he prefers to rely upon the common counts, he must take the hazard of having such a defense made under the general issue.

In an action of assumpsit the general rule is that a defendant may give in evidence, under the general issue. any matter which shows he was not indebted to the plaintiff when the suit was brought. And this is true whether the defense be that defendant was never indebted to plaintiff, or that the liability has been extinguished after it was incurred. Tender, the Statute of Limitations, alien enemy, and some other defenses must be pleaded specially. 1 Chit. Pl. 514-15. There are a few special pleas that may be pleaded, but usually not, when they amount to the general issue.

Had appellee chosen he could have surrendered the notes and had them canceled, and recovered under the count for goods sold and delivered. But had he done so he would have only recovered their value, as in that case appellant would have been permitted to have shown the warranty and its breach, and the difference in the goods as warranted and as they really were, and thus have reduced the recovery.

Under the general issue in this action, the true grounds of defense are seldom disclosed, nor is the real cause of action often disclosed by the common counts of the declaration. And yet the action is perhaps more used than any other, and it is seldom in practice that surprise upon the parties ever occurs.

We are clearly of opinion the court below erred in excluding the evidence offered to prove a partial failure of consideration after the notes were read in evidence, and the judgment of the court below must be reversed and the cause remanded.

(36) McNULTA v. LOCKRIDGE.

137 Ill. 270; 27 N. E. 452 (1891).

Baker, J. On the 15th day of January, 1887, James Molohan and Mary E. Molohan, his wife, while attempting to cross the track of the Wabash, St. Louis & Pacific Railway in a sleigh, at a public crossing in Christian county, were struck by a locomotive engine and tender and killed. On the 13th day of July following, Lockridge, the defendant in error, as administrator of their respective estates, brought suits against the plaintiff in error, as receiver of the Wabash, St. Louis & Pacific Railway Company for causing their deaths. The declarations in the two cases where alike except as to the name of the decedent; and by agreement of parties they were consolidated and tried as one case. The results of a jury trial were verdict and judgment for defendant in error, and against said receiver, for $6,000 damages, and the judgment was afterwards affirmed in the Appellate Court. The writ of error now in question brought the record to this court.

The declarations upon which the causes were tried each contained three counts, and the negligence alleged in the respective counts, of each declaration were that the statutory signals were not given on approaching the crossing; that trees, shrubbery, etc., were permitted to remain on the right of way upon and about the crossing, which obstructed the view of persons traveling on the highway, and prevented the deceased from seeing the engine and tender in time to avoid them; and that the engine was driven at a high and reckless rate of speed. The declarations each also alleged "that on the 16th day of December, 1886, in a certain cause in equity, then pending in the Circuit Court

of the United States for the Southern District of Illinois, wherein the Central Trust Company of New York and others were complainants, and the Wabash, St. Louis & Pacific Railway Company, et al., were defendants, one Thomas M. Cooley was by order of said court appointed receiver of the Wabash, St. Louis & Pacific Railway Company, and was then and there duly qualified as such receiver, and from thenceforward until the 1st day of April, A. D. 1887, had possession of, used and operated said railway," etc. And each declaration concluded as follows: "And the plaintiff further avers that said Thomas M. Cooley afterwards, to wit, on the 1st day of April, A. D. 1887, resigned his said office of receiver as aforesaid, and the said Circuit Court of the United States for the Southern District of Illinois accepted the resignation of said Thomas M. Cooley as such receiver, and afterwards, to wit, on the 1st day of April, A. D. 1887, the court last aforesaid, by an order entered in said cause aforesaid, appointed the defendant, John McNulta, receiver of said Wabash, St. Louis & Pacific Railway Company; that said defendant, John McNulta, then and there duly qualified as such receiver, and he thenceforward has been in possession of, using, and operating said railway as such receiver," etc. The only pleas interposed by the defendant were pleas of not guilty.

At the close of the evidence introduced by the plaintiff below, defendant in error here, the defendant below, plaintiff in error here, moved the court to instruct the jury that upon the evidence before them the administrator was not entitled to recover, but the court refused to so instruct the jury, and an exception to its ruling in that behalf was duly taken. Among the instructions given to the jury at the instance of the plaintiff below, were these: "(1) The court instructs the jury that if they believe from the evidence that the plaintiff's intestates, while exercising ordinary care to avoid injury, were killed by the negligence of the defendant, as charged in the declarations, they will find for the plaintiff." "(3) The court further instructs you that if

you believe from the evidence that the agents or servants of the defendant in charge of the engine in question failed to ring a bell or sound a whistle continuously for the distance of eighty rods before reaching the crossing, and that James Molohan and Mary E. Molohan, while attempting to pass over the railroad track at said crossing, were exercising due care and caution for their own safety, and were struck and killed at said crossing by an engine then in charge of such agents or servants, and that such killing was the direct consequence or result of the failure of said agents or servants to so ring a bell or sound a whistle, then the jury should find for the plaintiff. (4) The court instructs the jury that evidence of the general habit of James Molohan, when crossing railroad crossings, may be taken into consideration by the jury, together with all the facts and circumstances in evidence, in determining the degree of care used by the deceased while attempting to cross the defendant's railroad at the time they were killed: and that it is not necessary that the plaintiff should show by an eye-witness as to said Molohan's care and caution exercised by them at the crossing at the time they were killed, in order for the plaintiff in this case to recover, provided you believe from the evidence, and all the facts and circumstances in evidence, that they were exercising ordinary care and caution for their own safety at the time they attempted to cross the said railroad track." The court, at the instance of the defendant below, gave to the jury some thirteen instructions; and refused to give several others that were asked; and among those so refused was one which was as follows: "(4) The court instructs the jury that it is averred in plaintiff's declaration that at the time of the accident in question Thomas M. Cooley was operating the railway as receiver and that the defendant was subsequently appointed the successor of said Cooley as such receiver, and the court instructs you that to entitle the plaintiff to recover this averment must be proved, and, unless the plaintiff has made such proof, the jury should find for the defendant, without regard to all other questions in the case."

The two principal questions for determination are: First. Can an action at law be maintained against a receiver for the tort of the servants of his predecessor in the same receivership? Second. If such action can be maintained, did the general issue put the plaintiff upon proof of the averment of his declarations that at the time of the injuries complained of Cooley was operating the railway as receiver, and that the defendant was subsequently appointed his successor in the receivership? In addition to these, several questions of minor importance arise upon the rulings of the trial court on the instructions.

First. A receiver of a railroad company, who is exercising the franchise of such company and operating its road, is, in his official capacity, amenable to the same rules of liability that are applicable to the company when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the railroad under his management he is responsible upon the principle of respondeat superior. The liability, however, is not a personal liability, but a liability in his official capacity only; and the damage for such torts are not to be recovered in suits against him personally, and collected on executions against his individual property, but recovered in suits or proceedings in which he is named or designated as receiver, and to be paid only out of the fund or property which the court appointing him has placed in his possession and under his control. The corporation itself, having no control either over the receiver or his servants, is not, in the absence of an absolute liability imposed upon the company by statute, responsible for the negligence or torts of the employes of the receiver, and no suit against it for damages occasioned thereby can be maintained. These rules of law are well settled, and have been held in many adjudicated cases, and are laid down in the text-books. In the case at bar the judgment was not against McNulta personally, but against him in his official capacity of receiver; and no execution was awarded against him, either personally or otherwise. The judgment was that the plaintiff "have and

recover of and from said defendant, John McNulta, receiver of the Wabash, St. Louis & Pacific Railway Company, the said sum of $6,000, as his damages aforesaid, to be paid in due course of administration of the trust, together with his costs and charges herein expended." It seems to us that the expression found in the judgment "to be paid in due course of administration of the trust" affords the key for the solution of the question whether or not an action at law can be maintained against a receiver for the tort of the servants of his predecessor in office. The judgment, in substance and in fact, is not a judgment against John McNulta, but a judgment against John McNulta, receiver, etc., and to be paid out of the funds and property in his hands as such receiver; in other words, a judgment against the matter of the receivership which the court of chancery authoritatively organized in a certain cause in equity pending therein, wherein the Central Trust Company of New York and others were complainants, and the Wabash, St. Louis & Pacific Railway Company and others were defendants. The judgment is, as it were, in the nature of a judgment in rem, and the res—the thing against which it has vitality and force—is the matter of the receivership, the administration in the chancery court of the trust, and the fund and property which are the subjects of the trust. The receiver is sued as such, and merely because he is for the time being the tangible representative of the matter of the receivership. Although Cooley may have been at one time receiver, and may have resigned, and McNulta may have been appointed his successor in office, yet all the while the identity of the res—the matter of the receivership constituted by the court in the chancery suit brought by the Central Trust Company and others—was preserved. The liability for the torts and negligence charged in the declarations was upon the administration undertaken by the chancery court, and was, through such court, enforceable against the fund and property which were the subjects of the trust being administered, and followed such fund and property into whosesoever hands they came as receiver. The

torts which were complained of in the declarations were not the personal negligences of Cooley, but the negligences of his servants in his capacity of receiver—in other words, the negligences of the receiver; and when McNulta succeeded him in the same receivership they continued to be negligences of the receiver, and negligences for which such receivership was liable, and by relation negligences of McNulta, receiver, since he, and he only, was the legal representative of the receivership. The ground of the liability of the plaintiff in error, as receiver, grows out of the relation of Cooley, the former receiver, to the railroad which he operated, and the combination and identity of that relation in plaintiff in error as his successor in the same receivership. In Davis v. Duncan, 19 Fed. Rep. 477, the court said: "The proceedings against a receiver, as receiver, for the wrongs of his employes is in the nature of a proceeding in rem, and renders the property in his hands as such liable for compensation for such injuries." In Farmers' Loan & Trust Co. v. Central R. Co., 7 Fed. Rep. 539, the court said: "It is therefore obvious that suits against receivers are really and substantially suits against the fund or property of which they are custodians. They represent the property or fund. If judgment be obtained against them, the court orders it to be satisfied out of the fund or property."

The defendant in error alleges negligence on the part of the employes of Cooley, receiver, whereby his intestates were killed, and he claims that he is lawfully entitled to recover damages therefor. No suit lies against the company whose railroad was being operated by Cooley. High, Rec., § 396; 2 Ror. R. R. 896. No suit can be maintained against Cooley personally, or as an individual. High, Rec., § 395; 2 Ror. R. R. 894. Cooley having been discharged from the receivership, no suit can be prosecuted against him in an official or representative capacity for the torts committed by his employes while he was receiver. 2 Ror. R. R. 899; High, Rec. (2d Ed.), § 398b, and authorities there cited. In Telegraph Co. v. Jewett, 115 N. Y. 166, 21 N. E.

Rep. 1036, the court says: "Obviously, after the receiver has been discharged, and the property, by the action of the court, has all been taken out of his hands, there can be no propriety whatever in any further proceedings against him, because thereafter he ceases to represent any one. He can no longer act for or represent the company, or its creditors, or any other person interested in the property; and manifestly the court could not thereafter make an order that he should pay a creditor, he no longer having any funds out of which payment could be made. Farmers' Loan & Trust Co. v. Central R. Co., 2 McCrary, 181; 7 Fed. Rep. 537. It would be a very singular proceeding to permit a creditor to litigate his claim with a person who was formerly receiver, but who has ceased to be such, and who is no longer the officer or agent of the court, or subject to its control." There being, then, no right of action either against the railroad company, or personally against Cooley, the late receiver, or against Cooley in any representative capacity, is defendant in error without remedy at law for the enforcement of his purely legal rights of action? Section 2 of the act of congress of March 3, 1887, provides as follows: "That whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof." And section 3 of the act reads thus: "That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." It is unnecessary to state in detail the defects

and mischiefs in the administration of the law which this act of congress was intended to remedy. Suffice it to say that it is the evident intention of the statute that a plaintiff who has a strictly legal right of action and a claim for unliquidated damages enforceable against it and payable out of the property which is in the possession and under the control of a receiver appointed by a federal court shall not be deprived of his action at law, and of the right of trial by jury. In construing a remedial statute, its language, so far as is consistent with a fair construction of the law, should be so interpreted as to promote and advance the remedy. It was the legislative intention that the suits provided for in the act should be maintainable in respect to all acts or transactions of receivers in carrying on the business connected with the property in their possession and control. It is improbable that it was the intention that defendant in error should have the benefits conferred by the act, provided Cooley continued to be receiver, but should be deprived of such benefits in the event Cooley resigned, and was succeeded in the office of receiver by McNulta. It is unreasonable to suppose that it was the intention of congress that actions at law should not be maintained for torts committed by the employees of a receiver unless such actions were brought and prosecuted to judgment while such particular receiver remained in office; for, in that event, the right to prosecute suits at law and the right to trial by jury, which are the rights which the statute intended to preserve and protect could at any and all times be cut off and destroyed by the resignation or discharge of the particular receiver during whose administration of the receivership the torts were committed or injuries received. It it is not manifestly in conflict with the langauge of the act, it should receive such an interpretation as will be commensurate to the mischiefs which were intended to be remedied by it. The word "every," and the clause "may be sued in respect of any act or transaction of his," found in section 3, should not receive the narrow and constricted construction contended for by plain-

tiff in error. The word "his refers to the officer who is the receiver or manager of the property which is the subject of the trust organized by the court, and is not to be restricted to one individual who at a particular time during the existence of the receivership filled that office. Our conclusion, then, is that an action at law can be maintained against one receiver for the torts of the servants of his predecessor in the same receivership.

Second. It is conceded by plaintiff in error that when the general issue alone is pleaded it does not put in issue either the character or capacity in which the defendant is sued. It is claimed, however, that in the case at bar the general issue admitted that McNulta was receiver at the time he was sued, and that only. We think this is placing too restricted a signification upon the implied concessions made by the pleadings. Suppose that a declaration alleged that A., since deceased, made his last will and testament, by which he appointed B. his executor, and that B. qualified and acted as such executor; that B. afterwards resigned his office of executor, and was discharged; and that C. was thereupon appointed administrator de bonis non cum testamento annexo, and duly qualified as such administrator, and became and was the successor in office to B.; and further suppose the suit was brought against C., as such administrator, and for the purpose of enforcing a legal liability assumed by or imposed upon C. in his capacity of executor, and the declaration alleged in apt language the facts above stated, and also the particular cause of action sought to be enforced—in such state of the case, the general issue, and no other plea, being filed, there would be an implied admission not only that C. was administrator at the time of suit brought, but also implied admissions that B. was executor at the time when, etc., and that C. was successor in office to B., as averred in the declaration. Again, suppose suit was brought against the Illinois Central Railroad Company, and the declaration averred that at the time when, etc., said company was operating the Illinois Central Railroad from Chicago to Cairo, that at, etc., on, etc., aforesaid,

the plaintiff was a passenger on said railroad, and that by means of certain specific negligences on the part of the servants of the railroad company operating the train upon which he was a passenger, he, the plaintiff, received certain personal injuries, the plea of not guilty, and that only, being interposed, it could not properly be claimed that the suit of the plaintiff must fail for the reason that he did not introduce at the trial a witness who could testify from his personal knowledge that at the time when, etc., the corporation sued was operating the railroad, and that the conductor, engineer, fireman, and others operating the train had been employed by the company sued, and were in fact its servants, and not the servants of some receiver or other person or corporation. In the case last stated it would be impliedly conceded by the pleadings, not only that the Illinois Central Railroad Company was a corporation, but also that at the time of the alleged injury it was operating the particular line of railroad mentioned in the declaration, and that the operatives in charge of the train being run on said road were its servants and employes. The two supposed cases above stated, taken together, present in substance the case that appears in the record now before us. The admission upon the pleadings is of the character and capacity in which the defendant is sued. That character and capacity includes not only the bare fact that at the time that suit was instituted plaintiff in error was receiver, but the further facts alleged in the declarations that at the time when, etc., Cooley was receiver of the Wabash, St. Louis & Pacific Railway Company by appointment of court made in the cause in equity designated in the declarations, and was in possession of and operating the line of railway mentioned therein as such receiver; and that the employes operating the trains on said road were the servants of said Cooley as such receiver; and that on April 1, 1887, said Cooley resigned his office of receiver, and the court accepted such resignation, and on the same day, and in the same cause, appointed McNulta as such receiver, and as successor in office to Cooley; and that he, McNulta, then and there

qualified and entered upon his duties as such receiver. In line with what we have just stated on this point is the case of McNulta v. Ensch (Ill.), 24 N. E. Rep. 631. The views we have expressed sufficiently indicate our opinion that the trial court committed no error in refusing to instruct the jury as requested by the plaintiff in error. * * *

(37) CHICAGO CITY RY. CO. v. CARROLL.
206 Ill. 326 (1903).

[Case for personal injuries. Opinion by Mr. Justice Ricks.]

* * * In McNulta v. Lockridge, 137 Ill. 270, it was said that the plea of the general issue did not traverse the allegation that the defendant was possessed of and operated a railroad, and appellee invokes this case as authority for the position that it was unnecessary for him to make any proof of that allegation until it was denied. As there was evidence in the record tending to show ownership and operation of this railroad by appellant, the case does not need to be disposed of upon the theory of the presumption arising from the pleadings. The case does not present that question squarely, and we do not now feel called upon to determine just what construction shall be placed upon the language of the court in the Lockridge case. We are clear, however, that where the matter is not made an issue, and is but inducement to the general charge of negligence averred, slight evidence will be sufficient, uncontradicted, to support the allegation. * * *

(38) CHICAGO UNION TRACTION CO. v. JERKA.
227 Ill. 95; 81 N. E. 7 (1907).

[Case for personal injuries. Opinion by Mr. Justice Vickers.]

* * * Appellants most serious contention, in support of which a very exhaustive brief and argument have been submitted, is that the averment in plaintiff's declaration that the defendant "owned and operated a certain street railway, together with the tracks, electric motors, and other

appurtenances thereto belonging," is traversed by the plea of not guilty, and that the evidence in the record does not prove that appellant was the owner of and was operating the street car that injured appellee. If there was no evidence whatever in the record tending to prove that appellant was operating the car that did the injury, then the question would be presented which appellee has so exhaustively argued; that is, whether, in a case of this character, the plea of not guilty puts in issue the ownership of the road, cars, and other appliances which it is charged inflicted the injury. The appellant's motion to direct a verdict raises the question whether there is any competent evidence in the record fairly tending to support all the material allegations in appellee's declaration.

Upon looking into the record before us, we find the following testimony: John Jerka testified: "There was a car coming down from the north of Division street with a trailer on, and came around the corner so fast that the trailer left the track and hit my wagon and knocked me down to the ground. There was a motor car and one trailer on the train. I seen on the trailer 'C. U. T. Company.'" John D. Roy testified: "They generally have the Union Traction trailers following. It was a Union Traction car, the trailer." Peter Schwindek testified: "Q. Do you know to what company the trailer belonged? A. The Chicago Union Traction Company. I read it on the sign of the car right the same time it happened." James Karasch testified: "Q. Do you know what kind of cars were run on Elston avenue, there in June, before and after the 5th of June, 1902? A. The regular Elston avenue cars and some Union Traction cars." Thomas Mulcahy testified: "I have noticed Chicago Union Traction trailers run on Elston avenue near Division street on and before June 5, 1902." William Hart testified: "On and before June 5, 1902, I have observed the cars on Elston avenue. I have seen Chicago Union Traction cars." William Johnson testified: "On and before June 5, 1902, I have seen Union Traction trailers run on Elston avenue." Charles Woolf

testified: "I have seen Chicago Union Traction trailers on and before June 5, 1902, run on Elston avenue there; most of the trailers were Chicago Union Traction cars." This testimony fairly tended to prove the averment in the plaintiff's declaration that the Chicago Union Traction Company was in the possession and operation of the street car line upon which appellee was injured. If, as appellant contends, its plea of not guilty casts the burden upon appellee of proving this matter of inducement in the declaration, the issue thereby raised is one of fact, and, since the judgment of the trial court has been affirmed by the Appellate Court, this court can only look into the evidence on this issue to determine whether there is evidence fairly tending to prove it.

We might stop here and rest our judgment on the foregoing answer to appellant's position, but we are of the opinion that appellant's position is unsound for another reason. The plea of not guilty did not put in issue the ownership of the street car line or the cars operated thereon. These were matters of inducement, and it was not necessary that the appellee should offer any proof in support of these facts unless they were denied by special plea. This view we regard as firmly established in this state by the following cases: McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 452, 30 Am. St. Rep. 362; Illinois Life Ass'n v. Wells, 200 Ill. 445, 65 N. E. 1072; Chicago City Railway Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Pennsylvania Co. v. Chapman, 220 Ill. 428, 77 N. E. 248. In the case last above cited it was said: "It is first insisted as a ground of reversal that the appellant, the Pennsylvania Company, did not own or operate the tracks, engines, and cars in question, nor was the appellee in its employ at the time of his injury. In support of this contention, it is contended that the tracks, engines, and cars in question were operated by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, commonly called the 'Panhandle,' and that the appellee was in the employ of the latter company at the

time of the injury. Appellee contends that the Panhandle was a part of appellant's road and was being operated by it, and that he was in its employ. The suit was brought against the appellant company, and the declaration alleged that 'the Pennsylvania Company, a corporation, operated the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company,' and that appellee was injured while the appellant was thus operating the road. To this declaration appellant filed the general issue only. In the case of McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 452, 30 Am. St. Rep. 362, we decided that the general issue alone does not put in issue either the character in which the plaintiff sues or the character or capacity in which the defendant is sued. In this case the appellant, by filing only the general issue, impliedly conceded that at the time of the alleged injury it was operating the particular line of road mentioned in the declaration, and that the operators in charge of the trains were its servants and employes."

Whether the rule above laid down is in strict accord with the principles of common-law pleading as they existed prior to the adoption of the rule of the court of the Hilary term, 1834, is a matter of little practical concern, since the rule of stare decisis requires us to enforce the law as we find it, unless considerations of a very controlling character were presented which would justify us in overruling the previous decisions of this court and again laying the foundations of law anew. We see no hardships in requiring a defendant in a case of this character to plead specially that it was not the owner or in possession or operation of the property or instrumentalities which have caused the injury. The enforcement of this rule will, in our opinion, promote the ends of justice. If a plaintiff is afforded timely notice by a special plea that the want of ownership is relied upon as a defense, the plaintiff will have an opportunity of making investigation, and, if he ascertains that he has sued the wrong party, he may, before the statute of limitations becomes a defense, bring his suit against the party that is, in fact, liable. We cannot imagine a case where the rule es-

tablished by the decisions of this court can work any hardship on defendants. We see no reason for departing from the previous holdings of this court upon this question.

(39) SUPERVISORS OF STEPHENSON CO. v. MANNY.

56 Ill. 161 (1870).

[Opinion by Mr. Justice Thornton.]

An action of assumpsit was brought to recover back moneys paid for taxes assessed upon certain shares in the capital stock of the Second National Bank of Freeport. The taxes were assessed for the years 1865 and 1866.

If any recovery can be had, it is upon the count for money had and received. The principle governing in such case is, that the possession of money has been obtained, which can not be conscientiously withheld. Such an action is designed for the advancement of justice; and it is applicable, where a person receives money, which, in equity and good conscience, he ought to refund.

The defense to the claim, as well as the claim itself, is governed by the same principles. In speaking of this action, Lord Mansfield, in Moses v. McFarland, 2 Burr. 1010, said: "It is the most favorable way in which he can be sued; he can be liable no further than the money he has received; and against that he may go into every equitable defense upon the general issue; he may claim every equitable allowance, etc.; in short he may defend himself by everything which shows that the plaintiff, ex aequo et bono, is not entitled to the whole of his demand, or any part of it.

Apply these principles to the facts of this case, and there can be but one conclusion. * * * Appellant had an equitable right to the taxes paid, and should retain the money. * * *

(40) KAPISCHKI v. KOCH.
180 Ill. 46 (1899).

[Trespass for goods taken under a writ of replevin. Opinion by Mr. Justice Boggs.]

* * * The unauthorized seizure and retention of the goods vested appellant with the right to institute an action in trespass, in which he could recover compensatory damages, and, if the evidence disclosed a proper case, vindictive damages also, or an action on the replevin bond [in the action in which the goods had been seized] in which he could recover compensatory damages but not exemplary or vindictive damages. Each of these remedies proceeds upon the same cause of action, and the remedies were consistent and concurrent. While different remedies were available to the appellant, the cause of action was the same and was an entirety, and could not be divided into separate and distinct claims and both remedies pursued. The appellant was required to elect his remedy, and could not split his right to recover damages and maintain two actions against the appellees upon the same cause of action. (Karr v. Barstow, 24 Ill. 581; Stier v. Harms, 154, id. 476; 1 Am. & Eng. Ency. of Law, 184, c.; 1 id. 204.) If he elected to prosecute an action on the replevin bond and recovered judgment thereon and has received satisfaction thereof, he must be content therewith.

Nor do we think the trial court erred in directing a peremptory finding for the appellees. Counsel for appellant admitted in open court appellant had prosecuted an action on the replevin bond to final judgment and that such judgment had been fully paid and discharged. When the admission was made the court had before it for determination the question whether the proofs in behalf of the appellant (plaintiff) warranted the submission of the cause to the jury. The appellees had not offered any testimony, but under the plea of not guilty had the right to establish the facts so admitted as destructive of the right of appellant to recover. In actions on the case

it is admissible, under the general issue, to give in evidence a former recovery, a satisfaction, or any other matter ex post facto which shows that the cause of action has been discharged. (City of Chicago v. Babcock, 143 Ill. 358.) We need not consider whether the same rule of pleading obtained at common law in actions of trespass, for the reason that all distinctions between the two forms of action have been abolished by statute in this state. The admission of counsel established facts which, under the pleadings, it was competent to consider, and which, if made prior to the motion which called upon the court to determine the sufficiency of the case in behalf of appellant, would, as matter of law, conclusively have operated to defeat recovery in the action. The effect was not different because the admission was made while the court had the motion under consideration. The court rightfully considered the admission of counsel as constituting part of the case made by the appellant, and correctly ruled there could not legally be a finding in his favor by the jury.

There is no force in the suggestion it did not appear from the admission but that the judgment upon the replevin bond had been entered after the institution of the action in trespass. A defense otherwise admissible under a plea of not guilty, in an action of trespass, is competent in evidence, though it arose after the suit was brought and was not specially pleaded either to the maintenance of the suit or puis darrein continuance. City of Chicago v. Babcock, supra. There is no error in the record.

(41) CHICAGO TITLE & TRUST CO. v. CORE.
223 Ill. 58 (1906).

[Three counts in case and three in trespass. Plea, not guilty. Counts in case abandoned at commencement of trial. Opinion by Mr. Justice Cartwright.]

* * * The next alleged error is the refusal of the court to give nine instructions asked by appellant, directing the jury to find it not guilty if they believed, from the evidence, that the appellee voluntarily delivered possession of the

property upon the demand of Wilson, as attorney for appellant. Appellee purchased the property from Reuben Eckert on March 29, 1901, and paid therefor $2,500, which, according to the evidence for the appellant, was more than the value of the property. The only possible claim that appellant could have had to the goods would have been that the sale was fraudulent as to creditors and subject to be set aside for that reason. The only plea was not guilty, which operated only as a denial of the wrongful taking. (Harris v. Miner, 28 Ill. 135). The plea of not guilty in trespass is a simple denial of the facts stated in the declaration, and controverts the truth of such allegations as the plaintiff is bound to prove, and no more. The acts of the attorney and agent of appellant prima facie constituted a trespass. and matters of justification of excuse for such acts could not be proved under the plea of not guilty. Cook v. Miller, 11 Ill. 610, Hahn v. Ritter, 12 id. 80; Sturman v. Colon, 48 id. 463; Olsen v. Upshal, 69 id. 273; Illinois Steel Co. v. Novak, 184 id. 501; 21 Ency. of Pl. & Pr. 837.

Counsel say that appellant was entitled to have the instruction given for the reason that if appellee handed over the keys upon demand and upon the reading of the orders there was, in fact, no force and no trespass. Any unlawful exercise of authority over the goods of another will support trespass, even though no force be exerted, (28 Am. & Eng. Ency. of Law,—2d ed.—555) and it was not necessary to prove that the keys were obtained by physical force.

Counsel further say that proof of leave and license may be made under the general issue in an action of trespass, for the reason that all distinction between that action and an action on the case has been abolished by statute, and they rely upon the decision in Kapischki v. Koch, 180 Ill. 44, as establishing that rule. In that case it was held that the trial court did not err in directing a verdict upon the admission by counsel of facts destructive of the cause of action. One count was in case, and the well known rule was stated that in that form of action such evidence would be admissible under the plea of not guilty. That was the

whole scope of the decision and the case was afterward cited in Papke v. Hammond Co. 192 Ill. 631, as authority for the rule that in an action on the case the defendant may give in evidence, under a plea of not guilty, anything showing that the plaintiff ought not to recover. The distinction between the forms of actions of trespass and actions on the case has been abolished by statute, and therefore a joinder of counts in the two forms of action is permissible. (Krug v. Ward, 77 Ill. 603). At common law, if a declaration was in one form of action and the averments were in the other, the objection was fatal on motion in arrest of judgment. A count in case could not be joined with a count in trespass, and a misjoinder would render the declaration bad on demurrer or it might be availed of by motion in arrest or on error. (Dalson v. Bradberry, 50 Ill. 82.) The statute does away with the technical distinction between the two forms of action but does not affect the substantial rights or liabilities of the parties, and the averments and proof necessary to sustain either cause of action are the same as at common law. (Blalock v. Randall, 76 Ill. 224). The evidence for appellant only tended to prove leave or license of appellee to do acts which would otherwise be a trespass, and while the evidence was admissible on the question of damages it was not a defense to the action, and the court was right in refusing to give the instruction. * * *

(42) KEEGAN v. KINNARE.
123 Ill. 286; 14 N. E. 14 (1887).

Action on a bond given on appeal from a judgment for possession of certain premises, rendered in favor of plaintiff's intestate, which judgment was affirmed upon such appeal. Plaintiff, the administratrix, brings this action to recover the damages suffered by reason of such appeal, and for which indemnity was given by such bond, and defendants attempt to recoup damages caused by being forcibly ejected by the sheriff and his officers from the possession of the first mentioned premises, and not being permitted

to remove the buildings therefrom which they claimed to own.

Scholfield, J. The several grounds urged for a reversal of the judgment below will be considered in the order of their presentation in the printed argument of appellant's counsel.

First. Appellant's counsel offered evidence upon the trial which was rejected by the court to the effect that when the writ of possession was executed, Rose Keegan was prevented from removing from the demised premises a house thereon belonging to her. The damages thus sustained, it is contended, may be recouped from the damages that are recoverable for rent, etc., on the land. It is an indispensable element in the doctrine of recoupment that the demand sued for, and that recouped, shall arise out of the same subject-matter. Stow v. Yarwood, 14 Ill. 424; Streeter v. Streeter, 43 Ill. 155; Waterman v. Clark, 76 Ill. 428. Freeman, in his note to Van Epps v. Harrison, 40 Amer. Dec. 323, says (and we quote because, we think, accurately), "In its modern application, the foundation of recoupment is failure of consideration. The defendant, in effect, admits his failure to perform the contract upon which he is sued, and seeks to extenuate his default by showing that the plaintiff has failed, in some particular, to do that which was the consideration of the defendant's promise, and to that extent, therefore, that the plaintiff has no right to hold the defendant liable. Hence it is essential that the wrong of which the defendant complains should, in some way, impair the consideration of this contract. In other words, it must appear that the express or implied promise, broken by the plaintiff was the consideration for the defendant's promise." See also, Christy v. Ogles' Ex'rs, 33 Ill. 295. Illustrative of the principle, it has been held that in an action by a laborer for his wages, the employer can not recoup damages for an injury done by the plaintiff outside the scope of his employment. Railroad Co. v. Chumlet, 6 Heisk. 327. In an action by a landlord to recover rent, the tenant can not recoup damages for a trespass committed by the landlord which

does not amount to a breach of the covenant of quiet enjoyment. Cram v. Dresser, 2 Sand. 120; Edgerton v. Page, 20 N. Y. 281; Bartlett v. Farrington, 120 Mass. 284; Hulme v. Brown, 3 Heisk. 679. In an action by a vendor of land for the purchase money, the purchaser can not recoup the damages sustained by him by reason of the vendor's subsequently entering and taking the crops Slayback v. Jones, 9 Ind. 470. Damages for maliciously suing out an attachment in a suit have been held not to be subject to recoupment in the same suit because the wrong was in no way connected with the consideration of the contract sued on, but was an independent tort. Nolle v. Thompson, 3 Metc. (Ky.) 121; Freeman's note, supra.

And so in Evans v. Hughey, 76 Ill. 115, where the plaintiff sold land for the defendant, agreeing to take security for the first payment of $3,000 on other land of the value of $6,000, and afterwards the defendant sold to the same purchaser certain personal property for the sum of $2,500, and directed the plaintiff to take mortgage on the purchaser's farm, then valued at $11,200, for both payments, and record the same, and the plaintiff did take such mortgage, but, through his neglect, it was not recorded until after liens, to the extent of $1,179.50, had attached to the mortgaged premises, which the defendant, after foreclosure of his mortgage, was compelled to discharge by payment, we held, in a suit by the plaintiff to recover the compensation agreed upon for making the sale, that the defendant could not recoup the damages sustained by him in consequence of the neglect to record the mortgage, as the same did not arise out of the contract sought to be enforced by the plaintiff, but that his remedy should be sought in a distinct suit. What possible connection is there, here, between the conduct of the officer, or the heir at law (Frank Kinnare being then dead), in executing the writ of possession, and the subject-matter of this bond? The subject-matter of this bond is the prosecution of an appeal from the judgment of the Superior Court to the Appellate Court; it does not look beyond the affirmance or the reversal of that judgment; it is

to secure the appellee against loss by reason of the prosecution of that appeal, and liability was fixed by the judgment of affirmance. The liability on it, moreover, is to the administratrix who had, and has, no interest in the rents accruing from the real estate after the death of Frank Kinnare. Clearly, if the heir at law, or the officer executing the writ, or both, did a wrong resulting in legal injury to Rose A. Keegan, they alone are liable to her therefor. No principle of law can fasten such liability upon the estate of Frank Kinnare; much less can it be recouped in this action.

(43) LLOYD & CO. v. MFRS. & MERCHANTS WAREHOUSE CO.

102 Ill. App. 553 (1902).

[Assumpsit, with notice of set off. Opinion by Mr. Justice Waterman.]

Recoupment is a defense arising out of the subject-matter of the plaintiff's claim. It is an innovation upon the strict rules of the common law, sanctioned by the courts for the purpose of doing equity between the parties; it tends to promote justice and avoid a multiplicity of suits. It is necessary that this defense arise out of and be connected with the transaction or contract upon which the suit is brought, but it is not essential that the opposing claims should be of the same character.

A claim originating in tort may, by way of recoupment, be set up as a defense to a claim growing out of contracts, provided both arise out of the same subject-matter and are susceptible of adjustment in one action. Waterman on Set-off and Recoupment, Secs. 463-464.

Set-off is a counter demand which the defendant has against the plaintiff; it usually arises out of a transaction extrinsic to the plaintiff's cause of action; and if the set-off allowed be more than the allowable claim of the plaintiff, judgment for the excess may, in the action, be awarded to the defendant against the plaintiff. Waterman on Set-off, Sec. 2; Kingman v. Draper, 14 Ill. App. 577; Steere v. Brownell, 124 Ill. 27; East v. Crow, 70 Ill. 91.

Unlike the defense of recoupment a claim for damages based upon a tort can not be set up against one founded entirely upon contract. Set-off must be pleaded or interposed under notice; recoupment may be had under the general issue.

What is said, many times, to the effect that unliquidated damages can not be set off, has reference only to unliquidated damages growing out of tort. * * *

(44) BELDAM v. LEWISOHN.
51 Ill. App. 50 (1893).

[Opinion by Mr. Justice Gary.]

* * * The appellees sued for goods sold and delivered; the appellants sought by pleas and evidence to recoup the damages they had sustained by the refusal of the appellees to fill the whole order and the rise in copper. The pleas were useless; recoupment is under the general issue. Wadhams v. Swan, 109 Ill. 46; Tully v. Excelsior, 115 Ill. 544. * * *

(45) MURRAY v. CARLIN.
67 Ill. 286 (1873).

[Opinion by Mr. Justice McAllister.]

This was assumpsit in the common counts, brought in the McLean Circuit Court by appellee against appellant. The general issue was pleaded and there was a trial before the court and a jury, resulting in a verdict and judgment for the plaintiff below. We are disinclined, from all the circumstances in evidence, to disturb the verdict, upon the ground that the defendant established a settlement by the clear weight and preponderance of evidence. The evidence presented a fair question to the jury, whether plaintiff was not overreached by the alleged settlement, while in such mental condition from the use of ardent spirits as made him an easy victim. It seems to have been a settlement more in form, and by mere words, than by any payment of

the amounts due for the horses sold, the note and execution as signed by plaintiff to the defendant. The jury could judge better as to this than we can; but we are of the opinion that the defendant had the right, under the general issue, to prove a warranty of soundness of the horse sold at the price of $200, by plaintiff to him, to show a breach of such warranty and damages, and recoup the amount from the agreed price of that horse. Babcock v. Tice, 18 Ill. 420.

The court erred, therefore, in excluding defendant's offer to prove such warranty and a breach of it, for which the judgment must be reversed and the cause remanded.

(46) EWEN v. WILBOR.
208 Ill. 506 (1904).

[Assumpsit against a guarantor of payment of a promissory note. Opinion by Mr. Justice Ricks.]

* * * Appellant, by his seventh plea, pleaded a set-off of moneys due from appellee to Warren Ewen, Jr., alleged by appellant to have been assigned to him on September 1, 1893, by said Warren Ewen, Jr., and to support that plea; relied in part on the same evidence offered under the fifth plea, and other evidence offered, among which was a written assignment from Warren Ewen, Jr., dated September 1, 1893. Appellee's counsel asked leave to inquire about the paper offered, when the witness, Warren Ewen, Jr., said the assignment was made on the day of the trial. This writing, upon objection, the court excluded from the evidence. Appellant offered no witnesses except Warren Ewen, Jr., who testified [that appellee promised to bear one-half the expenses incurred and to be incurred by him in trying to get the government to adopt a certain patent process.] This claim is the foundation of appellant's set-off. The written assignment having been made after the suit was brought, and on the day of the trial, was inadmissible as evidence, proving a sale of the account, as the claim sought to be set off must have been held by appellant at the time the suit

was brought. (Pettis v. Westlake, 3 Scam. 535). That was the only evidence offered of the assignment of the debt. * * *

But waiving this point, all the evidence touching this set-off might have been properly excluded, had the court been requested to do so. It is fundamental that unliquidated damages arising out of contracts or covenants disconnected from the subject-matter of the plaintiff's claim, are not such claims or demands as constitute the subject-matter of set-off under the statute. (Hawks vs. Lands, 3 Gilm. 227; Sargeant v. Kellogg, 5 id. 273.) The set-off claimed in this case was for alleged moneys expended by Warren Ewen, Jr. [the maker of the note guaranteed by the defendant], under and upon an entirely distinct contract from that under which the note was given, and in no way related to it, upon a common project between appellee and said Warren Ewen, Jr., in which the latter claims appellee was to bear half the expense, and in which he testifies there was never any accounting or settlement or agreement as to the amount expended or the amount to be paid by the appellee. Had the suit been against Warren Ewen, Jr., directly, and not against the appellant, the plea of set-off should have failed. * * *

(47) LEATHE v. THOMAS.
218 Ill. 246; 75 N. E. 810 (1905).

[Suit upon a judgment rendered in the State of Missouri and pleas of set off.]

Per Curiam. It is first contended that the judgment exceeds the ad dammum of the pleas upon which judgment was rendered in favor of the defendant in error. The attention of the trial court was not challenged, by exception or otherwise, to the fact that the amount found by the referee to be due the defendant in error, and for which amount he recommended that defendant in error have judgment, exceeded the amount of the ad dammum of the pleas. Had the court's attention been called to that fact the pleas could

readily have been amended and the error avoided. In Butler v. Cornell, 148 Ill. 276, 35 N. E. 767, it is said that an objection to the report of a referee, not made in the trial court by exception, which might have been obviated by amendment, will not be considered on appeal or writ of error. In Metropolitan Accident Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359; Prairie State Loan & Building Ass'n v. Gorrie, 167 Ill. 414, 47 N. E. 739, and Wheatley Buck & Co. v. Chicago Trust & Savings Bank, 167 Ill. 480, 47 N. E. 711, it was held that an objection that the judgment exceeds the amount of the ad dammum of the declaration cannot be raised for the first time on appeal. In Wheatley, Buck & Co. v. Chicago Trust & Savings Bank, supra, the point was made that the judgment exceeded the ad dammum laid in the declaration. The court, on page 484 of 167 Ill., p. 712 of 47 N. E., said: "This, indeed, was error. But the error cannot now be taken advantage of. The objection must be considered as waived by reason of its not having been made in the trial court. Had that court's attention been called to the matter, the objection could readily have been obviated. Metropolitan Accident Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359; Utter v. Jaffray, 114 Ill. 470, 2 N. E. 494. Counsel, on the contrary, made no mention of the error in either the motion for a new trial or the motion in arrest of judgment." By reason of the failure of the plaintiff in error to raise the question in the trial court, the objection was waived, and cannot now be taken advantage of in this court.

It is next contended that the pleas of set-off presented no defense to the action, and that the court had no jurisdiction to entertain them; and it is urged that the court, by rendering judgment thereon in favor of the defendant in error, violated section 1 of article 4 of the Constitution of the United States, which provides, "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state," as it is said a set-off against a judgment is not permitted by the laws of the state of Missouri. The validity of the judgments rendered in

favor of plaintiff in error by the Missouri court, and upon which suit was brought, was not attacked, but full faith and credit were given thereto. Under the statute of this state (Hurd's Rev. St. 1903, c. 110, § 19), demands upon simple contracts may be set off against demands upon judgments, which statute includes a judgment rendered by a court of the state of Missouri as well as a judgment rendered by a court in this state. It has uniformly been held that each of the states of the Union may pass a law limiting the time within which an action may be brought in said state upon a judgment rendered in a court of another state, without thereby depriving the judgment of the full faith and credit which it is entitled to under the Constitution of the United States. This holding is based upon the ground that a statute of limitations affects only the remedy, and that a limitation law is a law of the forum, and must control. Metcalf v. City of Watertown, 153 U. S. 671, 14 Sup. Ct. 947, 38 L. Ed. 861. It is also held that a plea of set-off is a plea to the remedy. Mineral Point Railroad Co. v. Barron, 83 Ill. 365; Davis v. Morton, 5 Bush, 160, 96 Am. Dec. 345; Second Nat. Bank of Cincinnati v. Hemingray, 31 Ohio St. 168. That being true, the statute of the state wherein the action is brought controls as to what character of set-off, if any, may be pleaded. When, therefore, suit is brought upon a judgment of another state in the courts of this state, as the statute of this state permits demands upon simple contracts to be offset against judgments, the statute of this state will control. Furthermore, the statute of the state of Missouri upon the subject of set-off was not in evidence, and the courts of this state, without proof, will not take judicial notice thereof. In Chicago & Alton Railroad Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. 398, 30 L. Ed. 519, it was said: "Whenever it becomes necessary, under this requirement of the Constitution (article 4, § 1), for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with

knowledge of the laws of another state, but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review is matter of fact here. This was expressly decided in Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535, in respect to the faith and credit to be given by the courts of one state to the judgments of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another." * * *

(48) HOLMES v. McKENNAN.
120 Ill. App. 320 (1905).

[Assumpsit for services of plaintiff, a surgeon, Defendant pleaded the general issue, a plea of set-off consisting of the Common counts and also various special pleas some in set-off and some in recoupment all based upon alleged negligence of the plaintiff and lack of skill in performing the services for which suit was brought. Opinion by Mr. Justice Dibell.]

* * * The question is raised whether under the state of facts claimed by defendant he had a right to show his damages, if any, under pleas of set-off and recover an affirmative judgment if they exceeded the amount of plaintiff's bill, or whether he could only use the testimony by way of recoupment to defeat in whole or in part plaintiff's claim for compensation. Edwards v. Todd, 1 Scam. 462, was assumpsit to recover a sum agreed to be paid for the transportation of certain merchandise. Defendants gave notice, under the general issue, that they would prove, by way of set-off that part of the goods agreed to be transported, exceeding in value the whole of plaintiff's claim, was lost and destroyed through the negligence and carelessness of plaintiff. The court said the gist of the right to make a set-off arose from a failure of plaintiff to perform that part of his

contract which required him to deliver the lost goods as well as those not lost; that the claim did not partake of that uncertain character which marks cases of unliquidated damages sought to be recovered in actions purely ex delicto, to be embraced within the words "claims or demands" in the statute relating to set-off; but that those words are to be confined to such damages as arise from contracts or agreements expressed or implied. Nicholas v. Ruckells, 3 Scam. 298, was a suit on account. One charge by plaintiff was for the rent of a mill under a written contract, wherein plaintiff agreed to do certain things. One item of defendant's set-off, greatly exceeding plaintiff's claim, was for a certain loss occasioned to defendant by failure of plaintiff to keep said written contract. It was objected that evidence of this set-off was inadmissible, because it was in the nature of unliquidated damages. The objection was overruled, and defendant had a judgment for $61.14. It was held that the words, "claims or demands" in the statute relating to set-off embraced all cases arising out of contracts express or implied, and that this set-off arose out of the contract embraced in plaintiff's claim, and the evidence was properly admitted. Kaskaskia Bridge Co. v. Shannon, 1 Gilm. 15, was assumpsit upon certain drafts of orders. Defendants under a plea of non-assumpsit, gave notice that they would show, by way of set-off, that said drafts were given for the building of a bridge by plaintiff and that plaintiff so unskillfully and defectively performed the work that the bridge was wholly valueless and was lost to defendants and that thereby defendants were damaged in a sum far in excess of the amount of the orders. The court refused to admit proof of the matter stated in the notice. Plaintiff had judgment, and defendants appealed. It was held that the matter contained in the notice of set-off, being a claim for unliquidated damages arising ex contractu, constituted a good claim of set-off under the statute and that the court erred in refusing to admit the testimony. Hawks v. Lands, 3 Gilm. 227, was assumpsit. A demurrer was sustained to a plea of set-off which alleged a breach of a

certain covenant in a deed given by plaintiff to defendant. It was held this demurrer was properly sustained, because unliquidated damages arising out of contracts or torts totally disconnected with the subject-matter of plaintiff's claim are not such claims or demands as constitute a subject-matter of set-off under the statute; and that cases of Edwards v. Todd, supra, and Nichols v. Buckells, supra, had only gone the length of deciding that damages arising out of contracts, express or implied, may be set-off in actions ex contractu, but not where the claim for unliquidated damages is totally unconnected with plaintiff's cause of action. Sanger v. Fincher, 27 Ill. 246, was a bill in equity, but the subject of set-off was discussed. It was held that the statute did not limit the right of set-off to liquidated claims or demands, and that the construction placed upon the act is that where the damages are unliquidated the claim or demand should relate to the transaction out of which the controversy has grown, and that unliquidated damages arising out of the same transaction may be set-off under the statute. In Springdale Cemetery Association v. Smith, 32 Ill. 252 a suit to recover a balance claimed to be due under a contract to erect a cemetery vault, defendants asked the court to instruct the jury that if they believed from the evidence that defendants had suffered damage from the default or want of care and skill of the plaintiffs in performing such contract, and that such damage exceeded the amount plaintiffs would otherwise be entitled to recover, the jury should find for the defendants the amount of the excess. It was held the trial court erred in refusing that instruction, although the question here involved was not discussed but it was taken for granted in the opinion that in such case defendants would be entitled to recover an affirmative judgment. In De Forrest v. Oder, 42 Ill. 500, it was held that a plea of set-off was defective which offered to set off unliquidated damages growing out of a breach of a contract, without alleging that they grew out of and were a part of the contract sued upon. It was there said that such damages arising out of contracts

or torts not connected with the subject matter of the suit, do not constitute a proper set-off under our statute, and that there was no averment in the plea that the matter there set up by defendant was connected with the matter upon which plaintiff brought suit. In Clause v. Bullock Printing Press Co., 118 Ill. 612, it was held that unliquidated damages arising out of a contract unconnected with the subject-matter of plaintiff's suit were not the subject of set-off. In Higbie v. Rust, 211, Ill. 332, an action of assumpsit, defendant, under the general issue gave notice of set off. The Court excluded evidence of a set-off, and plaintiff recovered. It was there said of defendant: "The latter seeks to offset unliquidated damages which he charges resulted from the violation of an entirely distinct and independent contract. Such unliquidated damages could not be offset, as they grew out of an alleged breach of a contract other than those sued upon and in nowise connected therewith." In Hartshorn v. Kinsman, 16 Ill. App. 555, this court held that unliquidated damages which do not arise out of the contract or cause of action sued upon, are not a proper subject of set-off; that in order that unliquidated damages be set off, they must arise out of the transaction upon which the suit was brought. In Weaver v. Penny, 17 Ill. App. 628, this court applied the same rule. That was assumpsit on a promissory note, given for the price of sheep sold by plaintiff to defendant. Defendant claimed that the sheep were warranted sound and free from disease, and that they were in fact diseased, and many of them died, and the disease was communicated to cattle of defendant, and resulted in the death of several of the cattle. Defendant claimed damages for breach of the warranty, and sought to recoup or set off the damages. There was a stipulation that all evidence proper to go to the jury under any proper special plea might be given under the general issue. The trial court held in instructions that the defendant could not recover an affirmative judgment against plaintiff for damages occasioned by a breach of the contract of warranty, but could only recoup to an amount not exceeding plaintiff's claim for principal and

interest upon the note. It was held that these rulings were erroneous, but the judgment for plaintiff was affirmed for other reasons. In South Chicago City Railway Company v. Workman, 64 Ill. App. 383, it was held that in an action for wages, defendant may set off damages occasioned by the negligence of plaintiff in his employment, and that defendant may have judgment for any balance due; and that the fact that the damages were unliquidated is no obstacle to setting them off, when they grow out of the same subject-matter as the demand against which they are offered. The trial court refused a proposition of law that defendant could set off against the sums it owed plaintiff any sums due from plaintiff to defendant because of damage to its property caused by plaintiff's negligence in the performance of his work. It was held the court erred in refusing this proposition. In Scudder-Gale Grocer Co. v. Russell, 65 Ill. App. 281, plaintiff sold defendant coffee and fruit jars, the coffee to be delivered immediately, and the fruit jars within one month. Plaintiff sued for the price of the coffee, and the defendants sought to set off the damages they had sustained by reason of the non-delivery of the fruit jars, and defendants recovered a judgment for $25.05. The court said: "Inasmuch as these damages, though unliquidated, were occasioned by a breach of the contract sued upon, the right of set off, and therefore of recovery by the appellees of the excess due him, seems to be unquestionable."

In some of the earlier of the foregoing cases, there is language used which does not at all times maintain clearly the distinction between the recoupment and set off. There are some other cases in this State where the distinction is not clearly preserved, or where the principles laid down in the foregoing cases do not seem to be closely followed. Nevertheless we conclude that the rule stated in the authorities above cited is the law of this State. The amended third and fourth pleas of set-off in this case allege that the defendant employed plaintiff as a physician and surgeon to treat his wife, and that plaintiff entered upon the treatment and performed the operation so negligently and unskillfully,

that by and through his want of skill and care, the sickness and malady of defendant's wife was greatly aggravated, and she became greatly disordered and weakened in body, and so remained for a long time, and that defendant was thereby obliged to incur a great indebtedness to other physicians and surgeons, nurses and servants, in her care, causing him damage in the sum of $5,000, which he offered to set off against plaintiff's claim; and he averred that the several causes of action upon which plaintiff has declared, are claimed by plaintiff for, upon and out of the same subject matter set forth in the plea; and defendant therein prayed judgment for the balance. We conclude that under said amended third and fourth pleas, defendant was entitled to recover unliquidated damages growing out of the same subject matter and contract upon which plaintiff brought suit, if the proof sustained said pleas. Defendant could not recover under the amended second plea, which was the common counts, because they did not show that the matter sought to be set off arose out of the same subject-matter as that upon which plaintiff sued.

But for other reasons stated the judgment is reversed.

(49) MEYERS v. SCHEMP.
67 Ill. 469.

[Opinion by Mr. Justice McAllister.]

This was indebitatus assumpsit upon the common counts, brought by appellant against appellees; pleas, the general issue and set-off. There was a trial by jury and verdict for defendants upon which the court gave judgment. Plaintiff brings the case to this court by appeal.

The declaration containing no special count, the plaintiff sought to recover the sum of $445, which the defendants bid for a brick building belonging to plaintiff, and put up by him for sale at auction. The sale occurred June 24, 1871, and this suit was commenced July 5, 1871. The terms of sale were not reduced to writing, hence there was much dispute about them—the plaintiff claiming and introducing

evidence to the effect that the sum bid was $445, and to be cash down. While the defendants testified, themselves, and gave much corroborating testimony, that, although the amount bid was as claimed by the plaintiff, yet, the agreement was that plaintiff was to take his pay in brick which were to be taken out of the building when it was taken down, at $3.50 per thousand; and it was insisted as a defense, that, if such was the agreement, the plaintiff was bound to wait a reasonable time for the brick to be prepared and delivered before bringing his suit, and that the time intervening the sale and the suit was not reasonable for that purpose; so that the suit was prematurely brought. If the jury so found, it would be a good defense. The defendants would be entitled to a reasonable time to prepare the brick for delivery before they could be considered in default; and, besides, if the amount bid was to be paid in anything but money, no action could be sustained upon the common counts.

Indebitatus assumpsit will not lie where the agreement is not for the payment of money, but for the doing of some other thing. The action, in such case, must be special. Spratt v. McKinney, 1 Bibb, 595; Brookes v. Scott, 2 Munf. 344; Cochran v. Tatum, 8 Mon. 405; Snedicor v. Leachman, 10 Ala. 330; Burrall v. Jacob, 1 Barb. 165.

The contract being verbal, and for the sale of a brick building, why was it not within the Statute of Frauds? Prima facie a building is real estate. Chatterton v. Saul, 16 Ill. 149; Ogden v. Stock, 34 Ill. 522. There was nothing in the case to show that this building was not real estate. The materials of which it was composed would, so far as they had become severed by the fire, become personalty, but the main part of it remained as it was when used as a public house—realty; and, although part of the subject-matter might have been personalty, yet, if the contract embraced realty as well, it must be regarded as entire and governed by the Statute of Frauds. Cook v. Tombs, 2 Aust. 420; Lea v. Barber, ib. 425; Thayer v. Rock, 13 Wend. 53.

The plaintiff having declared upon the common counts, and then sought to recover under them the price agreed upon a verbal sale of realty, it was competent for defendants to rely upon the Statute of Frauds without pleading it. * * *

(50) GUNTON v. HUGHES.
181 Ill. 134 (1899).

[Case for libel. Opinion by Mr. Justice Carter.]

* * * In order to avoid the effect of the defendant's plea of the Statute of Limitations, which had been filed to the declaration before it was amended, the plaintiff, pursuing the rules governing equity pleading, amended his declaration and undertook to confess and avoid that branch of the defense. It has become the settled rule in equity in this state, that where it appears on the face of the bill that the cause of action is barred by laches or the Statute of Limitations the defect may be reached by demurrer to the bill. (Board of Supervisors of Henry County v. Winnebago Swamp Drainage Co., 52 Ill. 454; Same v. Same, id. 299; Kerfoot v. Billings, 160 id. 563; Coryell v. Klehm, 157 id. 462.) Special replications are not now permissible in equity pleadings, and matters which might be specially pleaded in reply to the answer must be availed of by amendments to the bill. (Tarleton v. Vietes, 1 Gilm. 470; Rev. Stat. Chap. 22, Sec. 28.) When, therefore, the bill sets up facts in avoidance of the statute or in excuse for the delay in filing the bill, it follows, as a reasonable rule, that their sufficiency may be tested by demurrer. But no such rule obtains in common law pleadings, where special replications are not only allowable but are necessary. No authority at the common law has been cited and we know of none, which would sustain the method of pleading resorted to in this case. Such a rule prevails in several states under codes, but the practice in this state has always been as at common law, to reply specially matters in confession and avoidance of special matters of defense set up by plea, and

section 32 of the Practice Act recognizes the propriety of such replications. In Chitty's Pl., 496, it is said: "It was always necessary to plead the Statute of Limitations specially." In 13 Ency. of Pl. & Pr., 200, the author says: "In actions at law, as contradistinguished from actions under the code, it has always been the established rule that if the defendant desires to avail himself of the Statute of Limitations as a bar to the demand in suit he must plead the defense. He can not demur to the declaration, even where it appears on its face that the limitation prescribed by the statute has expired, for the principal reason that thereby the plaintiff would be deprived of the opportunity of replying that the case was within some of the exceptions to the statute, or any other matter which would prevent the bar from attaching."

Such, of course, is the rule, and as the defendant can not, at law, raise the question by demurrer whether the action is barred or not, but must plead the statute if he wishes to avail himself of it, it follows, as a logical sequence, that the plaintiff can not avail himself of matter in avoidance of the statute by pleading such matter in his declaration before the statute has been set up as a bar by plea. The declaration tendered a double issue, and also was framed in plain violation of established precedents and rules of common law pleading. The demurrer [to it] was both general and special, and was properly sustained. To overrule it here would unsettle rules of pleading long established and introduce confusion and uncertainty where none now exist. The distinctions between common law and equity pleadings are well defined and well understood by the legal profession, and can not be ignored. The equity cases cited by counsel show only the rule in equity—not the rule at law. As said in Wisconsin Central Railroad Co. v. Wieczorek, 151 Ill. 579, "Deviations from well settled rules of proceeding are always of questionable expediency, and where indulged, because of some inconvenience or supposed hardship, have generally introduced confusion, and by becoming precedents have led to the perversion of an

orderly and just administration of the law." The plaintiff elected to stand by his declaration rather than to amend.

The judgment will be affirmed.

(51) NEAGLE v. KELLY.
146 Ill. 465 (1893).

[Opinion by Mr. Justice Craig.]

* * * It is also suggested in the argument that the Statute of Frauds may be availed of as a defense. Stafford obtained the possession of the premises from Kelly under an agreement to pay the rent. It was not collateral to any agreement made by Kelly, but, on the other hand, it was an original undertaking on his part, and the Statute of Frauds has no application to such an agreement. Besides, the Statute of Frauds was not pleaded or relied upon in the Circuit Court, and it is too late now for the first time to claim the benefit of the statute on appeal here.

(52) PEOPLE v. PULLMAN'S PALACE-CAR CO.
175 Ill. 125; 51 N. E. 664.

Boggs, J. This is an information in the nature of a quo warranto, filed by the attorney-general in the Circuit Court of Cook County, in the name and on behalf of the People of the State of Illinois against Pullman's Palace-Car Company. Said company is a corporation, organized in 1867 by a special act of the Legislature of Illinois, entitled "An act to incorporate Pullman's Palace-Car Company." 2 Priv. Laws, 1867, p. 337. The act is as follows:

"Section 1. Be it enacted by the people of the State of Illinois, represented in the general assembly: That George M. Pullman, John Crerar and Norman Williams, Jr., and their associates, successors and assigns, be and are hereby created a body politic and corporate, under the name and style of 'Pullman's Palace-Car Company,' with all powers, rights, privileges and immunities incident to corporations and necessary or useful for the purposes of this act: pro-

vided, that if the corporation created by this act shall not organize within one year after the passage hereof, then this act shall be null and void.

"Sec. 2. The capital stock of the said company shall be $100,000, and be divided into shares of $100 each, and it may be increased from time to time as a majority of the stockholders may direct, and shall be issued and transferred in such manner and under such conditions as the directors of the said company shall, by the by-laws thereof, prescribe.

"Sec. 3. The corporate powers of the said company shall be vested in and exercised by a board of directors, consisting of such number of persons, not less than three nor more than seven, as the stockholders of the said company may, from time to time, direct. The said directors shall be chosen by the stockholders at such time and place as may be fixed by the by-laws of the said company, and shall hold their offices for one year, and until their successors are elected and qualified. They shall elect one of their number president of said company, and may fill any vacancy in the said board occasioned by death, resignation or otherwise, for the unexpired portion of the office so becoming vacant, and make such rules, by-laws and regulations, and appoint such officers and servants as they may, from time to time, deem expedient. Until an election of directors as herein provided, the persons named as corporators in the first section of this act shall constitute a board of directors, and shall have and may exercise all the powers of such board.

"Sec. 4. The said corporation shall have power to manufacture, construct and purchase railway cars, with all convenient appendages, and supplies for persons traveling therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper.

"Sec. 5. The said corporation shall have power to borrow money, and may secure the payment of the same by deed of trust, mortgage or other security.

"Sec. 6. It may be lawful for the company hereby in-

corporated to purchase, acquire and hold such real estate as may be deemed necessary for the successful prosecution of their business, and may have power to sell and convey the same.

"Sec. 7. This act shall be deemed a public act, and shall take effect from and after its passage."

The information sets out the charter of the defendant, and then alleges certain acts which are alleged to be usurpations by the defendant of powers not conferred by its charter, and concludes with a prayer for the forfeiture of the charter of the corporation. The allegations contained in the information of the usurpations of power on the part of the defendant are, in substance, as follows: First. That it owns and controls a large ten-story business block, together with the ground on which it stands, worth $2,000,000, in the business center of the city of Chicago; that it rents three-fourths of said block to persons, firms and corporations, and derives a large income therefrom; that this business block is located many miles from its works or what is called the "Town of Pullman," and a small portion of it only is occupied by the company's employes; that this business block was built as an investment, and not because it had any real necessity therefor. Second. That it owns fifty acres of ground at Pullman, Ill., which are covered with two-story brick dwelling houses and three-story apartment dwellings; that all these houses are rented by it, and it derives therefrom large rentals; that the dwellings and apartment buildings, so rented, furnish home for 12,000 people, and are worth a large amount of money, and are usurpations of power on its part. Third. That it owns fifty acres of ground in said town of Pullman which are used for streets, alleys and ornamental grounds and that the same is very valuable, and that the owning of such lands for such purposes is a usurpation of power. Fourth. That it owns fifteen acres of ground on which are erected, among other buildings, the Arcade Building, the Hotel Florence and some school houses; that the Arcade Building is a large business block, and is rented by the company to

different persons, and there are carried on therein various and different kinds of business by the tenants occupying the same; and that said Arcade Building yields a rich profit to said company. Fifth. That it owns two churches in said town of Pullman, together with the ground on which they are erected, and it rents said church edifices to different congregations and derives a large profit therefrom. Sixth. That it owns a number of school houses in said town and the ground on which they are erected, and they are rented by it to the authorized educational authorities, and it derives a large income therefrom. Seventh. That it owns a large hotel, located in said town, and which is known as the "Hotel Florence;" that said company operates and controls said hotel, and pays for the supplies consumed therein, and for all help employed in and about said hotel; that it employes and pays a manager to look after said hotel; and in connection with said hotel it owns and operates a bar-room or saloon, and which saloon is located in said hotel building, and that in said saloon it sells all kinds of whiskies, intoxicating liquors and other drinks; that a government license is annually taken out for saloon purposes; and that the keeping and maintaining said hotel and the keeping and maintaining said saloon are all done for profit, and a large income is derived therefrom. Eighth. That it owns a theater and the ground whereon it stands, and that the same is done for profit; that it employs a manager to manage the same, and plays, operas and other attractions are performed therein. Ninth. That it owns a large hall, known as "Market Hall," and the ground whereon it stands; that said hall is rented by it for divers purposes for which large halls of the kind are rented in cities, and a large income is derived therefrom. Tenth. That it owns a large gas plant and operates the same in said town of Pullman, and rents said gas to the 12,000 people, residents of said town, to light their homes and for purposes of consumption as well as to light said streets, and that from all these sources a large profit is derived. Eleventh. That it owns and carries on a system of water mains and service pipes

within the town of Pullman, and through these, supplies, for profit, water to the different industries located in said town, as well as to the residences and apartment houses owned and rented by it; that it purchases said water from the city of Chicago and other sources, and sells the same, as aforesaid, for a large profit. Twelfth. That it owns a plant for generating steam, and owns the pipes to convey the steam to the residences of its said tenants in the town of Pullman, and supplies said tenants in said town with such steam, together with merchants and others, for pecuniary profit and derives a large income therefrom. Thirteenth. That it owns and operates a large brick plant at Pullman; that it manufactures and sells brick, and places upon the market, wherever purchasers can be found, brick so manufactured; that it has been for many years a competitor in the market for the sale of brick. Fourteenth. That it owns and operates a system of sewerage pipes and a pumping plant connected therewith; that through said sewerage pipes the sewerage and refuse accumulated in said town of 12,000 inhabitants is pumped onto a large farm owned by it, and spread over the same; that said company cultivates said land so manured, and raises thereon large quantities of cabbage, celery, beets, and other vegetables, and sells the same in the city of Chicago and other cities where it can find a market therefor, and makes shipments of such produce to the city of New Orleans; and that it realizes in this way large sums from operating said sewerage system and cultivating said farm. Fifteenth. That it operates, in this state and elsewhere, through leases or contracts, a number of cars, and in these, day and night, carries and sells for profit stocks of whiskies, wines, beer, and other malt and intoxicating liquors; that such whiskies, etc., are carried and sold for pecuniary gain, and, in doing so, it derives a large profit therefrom. Sixteenth. That it owns near the Belt Line road twenty-five acres of ground which it does not use. Seventeenth. That it owns near Lake Calumet 175 acres of vacant and unoccupied land. Eighteenth. That it owns fifty-five acres of land north of its

shops which are vacant and unoccupied. Nineteenth. That it owns sixteen acres of lots and blocks in the town of Pullman which are vacant and unoccupied. Twentieth. That a certain corporation, known as the "Union Foundry & Pullman Car-Wheel Company," was organized and existed in Cook county, and owned about ten acres of ground purchased by it from appellee; that appellee owned its stock, and had it organized, and now, in effect, controls and operates it; that in this way, and through this corporation, it manufactures structural iron, and places the same upon the market. Twenty-first. That it furnishes to the Allen Paper Car-Wheel Company the power that operates its machinery, and receives therefrom a large income. Twenty-second. That it owns the stock of the Pullman Iron & Steel Company, and controls, directs, and manipulates its affairs; that the said company manufactures bar iron, and for many years has manufactured railroad spikes, and sold the same upon the market, wherever purchasers could be found therefor; that such sales and the manufacturing of such products are, in effect, made by defendant. Twenty-third. That it organized, owned and controlled the Southern Pullman Palace-Car Company; that it owned its stock; and that the said company is now merged in defendant. Twenty-fourth. That it manipulates and controls the affairs of the town of Pullman, and maintains therein water and gas plants, and lights the streets of said town and owns the same, and exercises privileges and powers incident to a municipal corporation. Twenty-fifth. That it owns 110 acres of ground in Pullman, on which are erected its shops, and all that is not necessary for such purposes is a usurpation of power, and contrary to law.

To the six pleas of the defendant, as originally filed, demurrers were sustained, upon the ground that each assumed to, but did not, answer the entire information. They were amended. Each of the amended pleas sets out the charter of defendant, and then alleges certain matters as inducement, and concludes with a traverse under the absque hoc The first amended plea assumes to answer the entire in-

formation, except so much thereof as charges defendant with owning and holding certain shares of the capital stock in the Union Foundry & Pullman Car Wheel Works, in the Southern Pullman Palace-Car Company, and in the Pullman Iron & Steel Company, and with selling and furnishing, upon its sleeping cars, whiskies, wines, beer, and other malt and intoxicating liquors, to persons traveling therein. The second and third pleas assume each the same burden as that assumed by the first, but with this additional exception; that neither of them purports to answer the charge of owning a large office building in the center of the city of Chicago. The fourth plea undertakes to answer only so much of the information as charges the defendant with owning and holding certain of the capital stock of the Pullman Iron & Steel Company. The fifth plea undertakes to answer only so much of the information as charges the defendant with selling and furnishing, upon its sleeping cars, whiskies, wines, beer, and other intoxicating liquors to persons traveling therein. And the sixth plea undertakes to answer the entire information, except that part of it which charges the defendant with owning and holding shares of the capital stock of the Pullman Iron & Steel Company.

Demurrers were interposed by the attorney general to these several amended pleas. The demurrer to the fourth plea was sustained, and, the defendant electing to abide by its said plea, judgment was entered against it thereon, ousting the defendant from the liberty of owning capital stock in the Pullman Iron & Steel Company. The demurrers to the other pleas, however, were overruled, and, the attorney general electing to abide by the demurrers, judgment was entered finding the defendant not guilty as charged against it in the information, except as to the charge of owning capital stock in said Pullman Iron & Steel Company. To the judgment of the court overruling the demurrer to the first, second, third, fifth, and sixth pleas the people duly excepted, and appealed from said judgment to this court. The defendant has assigned cross-errors on the ruling and judg-

ment of the court sustaining the demurrer to the fourth plea.

Paragraph 23 of the amended sixth plea avers as follows: "Defendant further states that heretofore in this plea it has set out all the business in which it is engaged, and all the real property which it owns in said county of Cook, and particularly it here states that it does not own any brickyard, and does not own one hundred and seventy-five acres south of Lake Calumet; that it does not own any stock in the Union Foundry & Pullman Car-Wheel Works; that said Union Foundry & Pullman Car-Wheel Company owns no property, and by action of its stockholders it has ceased to exist; and that defendant does not own any stock of the Southern Pullman Palace-Car Company, and exercises no control over it." The demurrer, of course, admits the truth of these several statements and denials, and the effect of this disclaimer is to eliminate from further consideration the charges of the information in respect to said matters.

Each of the amended pleas, as already stated, sets out the charter of the defendant, and then alleges certain matters of inducement, and concludes with a traverse under the absque hoc. The design of a special traverse, as distinguished from a common traverse, is to explain or qualify the denial. The essential parts of such a plea are the inducement, the denial and the verification. The issuable part of the plea is the denial, which is under the absque hoc, and when the denial under the absque hoc is sufficient no issue of fact can be formed upon the inducement. The matter, however, set up in the inducement must be such as in itself amounts to a sufficient answer, in substance, to the declaration or information. The plaintiff may elect to either form an issue of fact by pleading to the absque hoc, or to form an issue of law by demurring to the plea, and thereby take exceptions, in point of law, to the explanatory matters set up in the inducement. In the several amended pleas in the case at bar the denials under the absque hoc are amply and necessarily sufficient; for, with the exception of

the allegations of the organization and existence of the defendant corporation, they specifically deny all the averments of the information. Therefore the questions to be determined upon this appeal have reference to the sufficiency of the matters stated in the inducements to said pleas to constitute valid answers and defenses, in substance, to the several charges made in the information. As matter of course, the demurrers admit the truth of all the statements made in the plea.

Counsel for appellee contend that full warrant and authority for the various acts which, as it appears from the pleas, the corporation has done, are to be found either in the powers expressly conferred by its charter or in the powers possessed by implication of law. In order to determine correctly the sufficiency of the pleas in the light of this contention of appellee, it is essential the rules and principles of law applicable to the matter of the express and implied powers of corporations should be ascertained and declared. * * *

(53) RIPLEY v. LEVERENZ.

183 Ill. 519; 56 N. E. 166 (1899).

Carter, J. The Appellate Court affirmed a judgment of the Superior Court of Cook County in favor of appellee, who was the plaintiff, and against the appellant, in a suit brought for a personal injury. The first count of the declaration charged that the defendant carelessly and negligently drove his team of horses, attached to his carriage, in which he was riding upon the public streets, against the plaintiff and injured him. The second count alleged that the defendant willfully, wantonly and maliciously drove said team against the plaintiff and thereby injured him. Plea of the general issue was filed, and at a subsequent term a plea puis darrein continuance, setting up that since the last continuance the plaintiff had, by his certain written acquittance, released and acquitted the defendant of and from all claims and demands on account of the cause

of action mentioned in the declaration. The plaintiff demurred to this plea. The plaintiff was an infant and sued by his next friend, and the declaration alleged that he was under the age of fourteen years; and the alleged defect in the plea was that, as the record showed that the plaintiff was an infant, he was incapable of binding himself by the contract of release set up in the plea. The court announced that the demurrer would be sustained, and thereupon before the order sustaining the demurrer was entered, the defendant moved the court for leave to withdraw said plea and to reinstate the plea of the general issue theretofore filed, but the court denied the motion and entered the order sustaining the demurrer; and the defendant then moved the court for leave to file a new plea of the general issue instanter, but this motion was also overruled, and an order entered for the assessment of the plaintiff's damages, and a jury was impaneled for that purpose. At the request of the plaintiff, the court gave to the jury this instruction: "The course of pleading is such that the defendant can not dispute his liability for some damages, but how much, is a question for the jury upon the evidence." The jury assessed the damages at $2,750, and after overruling defendant's motion for a new trial the court rendered judgment on the verdict.

The Appellate Court did not consider that damages assessed were excessive, and we are precluded from considering that question, so far as the weight of the evidence is concerned; but we are of the opinion that erroneous rulings of the court contributed to the verdict rendered, and that the judgment ought to be reversed. It is a rule of common law pleading, and recognized by the decisions and practice in this state, that "a plea puis darrein continuance supersedes all other pleas and defenses in the cause, and by operation of law the previous pleas are stricken from the record, and the cause of action is admitted to the same extent as if no other defense had been urged than that contained in this plea. Everything is confessed except the matter contested by the plea puis." Angus v.

Bank, 170 Ill. 298, 48 N. E. 946. Under this rule, when the demurrer was sustained to the plea puis, the cause of action stood practically confessed, and the defendant could make no defense except to the amount of damages; and so the jury were instructed that the defendant could not dispute his liability for some damages. But what sufficient reason was there for refusing leave to the defendant to amend his pleadings?—for his motion amounted substantially to that. We shall not consider the question, which counsel on both sides have argued at great length, whether the demurrer was properly sustained or not, nor whether the alleged discharge might not have been given in evidence under the general issue (City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271) for the reason that the defendant did not stand by his plea, but waived the question by asking leave to withdraw it and to file another. The first section of the statute in relation to amendments provides "that the court in which an action is pending shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein." And the twenty-third section of the practice act provides that, "at any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, * * * and in any matter, either in form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense." And in Bemis v. Homer, 145 Ill. 567, 33 N. E. 869, we said: "It is the policy of our statute allowing amendments that neither party to an action shall be deprived of a substantial right through defects or omissions in pleadings, if they will use reasonable diligence to avoid that result, by applying to the court for leave to amend or supply the omission." Instead of asking leave to amend the plea puis, as the defendant might have done, he asked leave, at the earliest moment when the court announced that

he considered it insufficient, to withdraw it and to reinstate the plea of the general issue. This motion should have been allowed, with or without terms, as the court, in the exercise of a sound discretion, might determine. By so doing the defendant would have been enabled, using the language of the statute, "to make a legal defense," and would not have been "deprived of a substantial right through defects or omissions in pleadings." The technical rule that the general issue was waived by the plea puis should not have been permitted to operate, at that stage of the case, to deprive the defendant of the right to make his defense, when its effect could have been obviated by the allowance of his motion to withdraw the plea, and refile or file another plea of the general issue. The judgments of the Appellate and Superior Courts are each reversed, and the cause is remanded to the Superior Court for further proceedings not inconsistent with the views we have expressed. Reversed and remanded.

NOTE: ILLINOIS PRACTICE ACT OF 1907.
Hurd's Statutes (1908) p. 1624.

§ 50. The pleading of a plea puis darrein continuance shall not waive former pleas: Provided, however, that the court may permit more than one such plea to be filed, and, in granting such permission, may direct that the pleading thereof shall be a waiver of former pleas.

(54) ALLEN v. SCOTT.
13 Ill. 80 (1851).

Allen brought this action of trespass against Scott for entering the close of Allen and seizing, taking and driving away one yoke of oxen, etc., the goods of Allen, etc., and converting the same to his own use, etc. The declaration contains two counts; the second is for taking and carrying away the same goods, etc. To this declaration Scott pleaded not guilty, and a special plea, stating: That at the time when, etc., he, Scott, was collector of the corporation taxes

for the town of Chester; that as such collector he proceeded to collect the taxes of said town; that Allen owed taxes; and as such collector, the taxes being due, Scott entered into and upon said close for the purpose of seizing and taking, etc., and did take and seize, etc., said goods as and for the taxes so due, which are the trespasses complained of, etc.

To the plea of not guilty there was an issue to the country. To the special plea Allen replied [in two replications] that Scott, in his own wrong, and not in the due execution of his office, committed the trespass, etc., because the ordinance required that the collector, if the taxes should not be paid when demanded, or within ten days thereafter, should proceed to collect the taxes by distraining the personal chattels of, etc., and selling the same, etc., and that Scott did not, ten days before the seizing and taking, etc., make such demand of the payment of said taxes, etc., and that Scott entered with force and in his own wrong, etc.

To these replications Scott demurred, to which there was joinder; the demurrer was sustained, and Scott had judgment for his costs. From this decision, rendered at September term, 1850, by Underwood, Judge, in the Randolph Circuit Court, Allen appealed.

Caton, J. * * * To the same plea the plaintiff also filed the general replication, de injuria, etc., to which a demurrer was also sustained, and, we think, properly. It would be a useless labor to attempt to review all the cases where this replication has been sustained or overruled. To reconcile them all would be impossible. There are cases undoubtedly sustaining the rule insisted upon by the plaintiff's counsel, that this replication is proper, except where the plea justifies by matter of record; and yet cases are not wanting where a special replication has been required to a plea setting up a defense in no way depending upon matter of record. It must be admitted, that many of these distinctions are more artificial than substantial, and do not contribute very essentially to the promotion of the ends of justice. So long, however, as we are to look to the rules

of the common law to govern us in pleading, we are not at liberty to disregard them. The most satisfactory and tangible rule is this: that where the defense sets up matter of positive and absolute right, as the levy of an execution, the service of a warrant, the collection of tithes or taxes, and the like, there a special replication is required; but where the matter set up in defense amounts to but an excuse for the act complained of, and is not the exercise of an affirmative right, as son assault demesne, there the general replication de injuria, etc, is sufficient. Lytle v. Lee & Ruggles, 5 Johns. 112; Coffin v. Bassett, 2 Pick. 357; Coburn v. Hopkins, 4 Wend. 578.

(55) I. C. R. R. CO. v. SWIFT.
213 Ill. 317 (1904).

[Case for personal injuries. Opinion by Mr. Justice Scott.]

* * * The plea of the Statute of Limitations seems to have been interposed as to all the additional counts of the declaration. It did not present a defense to all of them, and we are therefore unable to say that the court erred in sustaining the demurrer to that plea. * * *

(56) FISH v. FARWELL.
160 Ill. 238 (1896).

[Assumpsit. Pleas that the supposed causes of action * * * and each of them accrued to said plaintiffs. if at all, more than five years prior, etc., etc. Demurrer to these pleas, and same overruled; replications filed. and demurrers to these replications. Opinion by Mr. Justice Baker.]

* * * As we understand counsel for appellants, it is claimed that even if their special replications to the pleas should be conceded to be bad on demurrer, yet that since the pleas to which they applied were also bad, it was error in the trial court not to carry the demurrer back and sustain it to the pleas. This would not, under the circumstances of the case, have been a correct practice. The rule is, that the court will not carry a demurrer to replications back to pleas,

when a demurrer to such pleas has already been overruled. The party pleading over, waives his demurrer, and admits the sufficiency of the pleas. (Stearns v. Cope, 109 Ill. 340.) We do not understand the case of Fort Dearborn Lodge v. Klein, 115 Ill. 177, to abrogate this rule. It merely holds that if, at any time before trial, the court becomes satisfied that an erroneous ruling has been made with respect to the sufficiency of a pleading, it has power to set aside the order made in regard thereto, and correct the error. But here it is manifest that the court never became satisfied an erroneous ruling had been made in respect to the pleas, and therefore there was no occasion for exercising the power in question. And besides this, no application was made by appellants to the court for leave to withdraw their replications, or to set aside the order overruling the demurrers. It is not the practice of courts to give to parties that which they do not ask.

And in connection with the matter just considered, it is urged that the several pleas of the Statute of Limitations are defective, in not giving color to the subject-matter of said pleas, and that therefore they are not pleas by way of confession and avoidance. The point made is that the expression, "if at all," is used in each of these pleas, and that the use of that expression prevents the statements in the pleas from being admissions that the causes of action accrued to the plaintiffs. The pleas seem to be in accordance with the precedents. In 3 Chitty's Pleading, *941, the form of the plea actio non accrevit is given thus:

"That the said several supposed causes of action in the said declaration mentioned (if any such there were or still are) did not, nor did any or either of them, accrue," etc. The words "if at all," do not traverse the cause of action, and in a special plea, that which is not traversed is admitted.

* * *

It seems to be supposed that the fact that process in this cause was served upon John V. Farwell, Jr., one of appellees, on October 3, 1888, and not served upon the other four appellees until in March, 1892, makes a marked difference

between them, and that the former stands upon a stronger footing in respect to their respective rights to avail themselves of the statutory privilege of pleading the five years' limitation law.

We do not understand such to be the case. The plaintiffs below, on the 29th day of September, 1888, filed in the office of the clerk of the Circuit Court their praecipe, for a summons against the appellees, and on the same day the summons was issued. That was the commencement of the suit, both as against John V. Farwell, Jr., upon whom service was had on October 3, 1888, and as against the other appellees, upon whom service was had in March, 1892. (Schroeder v. Merchants' and Mechanics' Ins. Co., 104 Ill. 71.) * * *

(57) DILCHER v. SCHORIK.
207 Ill. 528; 69 N. E. 807 (1904).

Cartwright, J. Appellant filed in the Circuit Court of Cook County his petition, verified by affidavit, stating that he was a candidate on the Democratic ticket for the office of constable at an election held April 7, 1903, in the town of West Chicago; that appellee was a candidate on an independent ticket; that appellee was declared duly elected, but was not eligible to the office on account of not being a resident of the town of West Chicago for a period of one year prior to the day of election; and that appellee, being an independent candidate, was not regularly nominated, for the reason that he did not file with the county clerk a certificate signed by the required percentage of the qualified voters of the town, as required by the statute. The petition did not question the election of appellee, but only the regularity of his nomination and his eligibility to the office. The court sustained a demurrer to the petition, whereupon appellant entered his motion for leave to amend the petition, which motion was denied by the court, and the petition was dismissed.

Appellant, by his petition, did not seek to contest the election of appellee, and the court had no jurisdiction on the

question sought to be raised by it. Section 10 of the ballot law provides that certificates of nomination and nomination papers shall be deemed valid unless objected to, and in case of objection the decision of the board of town auditors, or of the board of election commissioners, where such board exists, shall be final. Hurd's Rev. St. 1899, p. 804, c. 46, § 297. The question whether a person elected to office possesses the necessary qualifications can only be determined by information in the nature of quo warranto. The jurisdiction of the court in a contest of an election is limited to the question who was elected. Greenwood v. Murphy, 131 Ill. 604, 23 N. E. 421. The court did not err in sustaining the demurrer.

The only other question is whether the court erred in refusing leave to amend the petition. The statute requires a verified petition, stating the points on which the election will be contested, to be filed within thirty days after the person whose election is contested is declared elected. The petition, which was filed within the time required by statute, did not state any point upon which the election was or could be contested. It merely asked the court to declare appellant, who was not elected, entitled to the office, because appellee, who was elected, was not regularly nominated, or eligible to the office. Any amendment which would give the court jurisdiction would necessarily constitute an entirely new and different petition after the limitation had run. But, if the petition could have been amended, no amendment was presented, and the motion did not state in what respect appellant proposed to amend the petition. He does not even now suggest what amendment he desired to make or could have made, but says the amendment was presumably to meet some objection to the petition. A party is not entitled, as of right, to have leave to amend a pleading, regardless of what the amendment is to be. A party who desires to file an amended pleading should prepare and submit it to the inspection of the court There is no presumption that a proposed amendment will be a proper one, and it is not error to refuse to allow an amend-

ment which is not presented, and where there are no means of determining whether the amendment will be a proper and sufficient one or not. Jones v. Kennicott, 83 Ill. 484; McFarland v. Claypool, 128 Ill. 397, 21 N. E. 587.

The judgment is affirmed. Judgment affirmed.

(58) STANBERRY v. MOORE.
56 Ill. 473 (1870).

[Opinion by Mr. Justice Thornton.]

* * * The declaration in this case, containing a number of special counts and the common counts in assumpsit, was filed in May, 1867. It was twice amended, and at the special November term, 1868, a demurrer was sustained to the special counts and overruled to the common counts. Leave was then given to amend, but, from a careful examination of the record, we can not ascertain that any amendment was made. Counsel for appellee say that the declaration was amended "by proper erasures and interlineations," and was refiled January 19, 1869. The clerk also certifies to the refiling, but this certificate forms no part of the record. There are neither erasures nor interlineations in the record. In fact the record shows that no amended declaration was filed subsequently to the term at which the demurrer was sustained. We can not forbear the remark that the practice of making amendments by erasures and interlineations is a bad one, and ought not to be tolerated by the courts. A paper thus disfigured ought to be stricken from the files. * * *

(59) W. C. R. R. CO. v. WIECZOREK.
151 Ill. 583 (1894).

[Case. Opinion by Mr. Justice Shope.]

* * * On motion made by the defendant for non-suit, leave was asked by plaintiff to amend his declaration [to make it conform to the evidence.] The motion was overruled and the leave granted. The proposed amendment was not in fact made, and the declaration is presented upon this

record without amendment, and in all respects as it was when the motion for non-suit was entered. True, leave was given to amend the declaration, and this leave, together with the words of the proposed amendment, and where to be placed in the pleading, is shown by the bill of exceptions, and while the Appellate Court saw fit to treat the leave given as amounting in effect to an amendment actually made, we do not feel at liberty to so regard it. If a party, for any reason, disregards the leave given by the trial court to amend his pleading so as to make it correspond with the proofs, and omits without justifiable cause, the due incorporation into the record of the amendment pursuant to the leave, this court, sua sponte, has no authority to carry out the leave, make his amendment for him, interpolate it into the record, and thereby save him harmless of error assigned. After obtaining such leave, the plaintiff was in no wise obliged to exercise the privilege given and make the amendment, and until the amendment was in fact made, the declaration in all respects remained the same as though no leave to amend it had been given. Ogden v. Town of Lake View, 121 Ill. 422. * * *

The judgment of courts of review must always be formed upon the record, and from that alone. If they should assume to cure mistakes or omissions of the parties or counsel in the court below, by supplying matters omitted, inadvertently or otherwise, from the record, they might in like manner change the record in other respects, to the detriment of parties litigant. To do so would introduce the greatest uncertainty and confusion, be the exercise of a power with which they are not vested, and destroy the security and certainty which should inhere in judicial proceedings. Diminution of the record in this case is not suggested. Nor is any cause or excuse shown, or explanation offered, for appellee's omission to make his proposed amendment of the declaration, pursuant to the leave given. For aught that appears, the omission was purely the result of his voluntary choice. This record, therefore, in all essential particulars, must be treated as though no amendment of the declaration

had been permitted or suggested. And the question, therefore, is whether the court erred in overruling the motion for non-suit, and in refusing to instruct the jury to find for the defendant, as the pleadings then stood. * * *

(60) CHICAGO CITY RY. CO. v. McMEEN.
206 Ill. 108. 68 N. E. 1093 (1903).

Ricks, J. This was an action on the case, begun on the 6th of January, 1892, by appellee, McMeen, against appellant, the Chicago City Railway Company, to recover damages for personal injuries alleged to have been received by him on the 28th day of September, 1891, while a passenger on a street car belonging to and operated by appellant. The original declaration alleged that the defendant "was possessed of, using and operating a certain street railroad extending through the said city of Chicago, from the corner of State and Lake streets, in the said city, and southward along the said State street to Sixty-seventh street, and beyond, in the county aforesaid; * * * that at the said corner of State and Lake streets aforesaid, on the day aforesaid, he then became a passenger on a certain train of the defendant on the said railroad then and there running on said State street, to be carried as said passenger, and was then and there accordingly carried on the said train from thence southward to a point in the block between Thirty-eighth and Thirty-ninth streets, on said street aforesaid, for a certain reward to the said defendant; * * * that while the said train upon which plaintiff was a passenger, was standing in the middle of the block aforesaid, on the day aforesaid, and while the plaintiff, with all due care and diligence, was seated in the said car on the said train, waiting for the same to be moved forward, the defendant then and there carelessly and negligently so managed and controlled a certain other one of its trains running on the track in the rear of the one upon which the plaintiff was a passenger, that the same ran into the rear end of, and struck the standing car in which the plaintiff was seated, with great force and violence, and thereby the plaintiff was then and there

thrown with great violence and force from off the seat upon which he was seated, upon the seat in front of him," and thereby received the injuries of which he complains. To this declaration the defendant filed the plea of general issue. October 1, 1896, more than two years after the action accrued, the plaintiff filed an amendment to the declaration. The declaration, as amended, charged that the plaintiff was a passenger on the Cottage Grove avenue line, and the place of the accident and injury between Thirty-eighth and Thirty-ninth streets on Cottage Grove avenue. These amendments were made by striking out the portions of the original declaration which referred to State street, and substituting clauses which fixed the line as the Cottage Grove avenue line, and the place at which the accident happened on Cottage Grove avenue between Thirty-eighth and Thirty-ninth streets. In other respects the original declaration was not altered. To the amended declaration the defendant filed the general issue, and also a plea of the Statute of Limitations. To the plea of the Statute of Limitations, plaintiff filed two replications, the first of which tendered issue upon the allegation of the plea that the cause of action therein mentioned did not accrue to the plaintiff at any time within two years next before the commencement of this suit, and the second alleged that the plaintiff ought not to be barred from maintaining his suit upon the declaration as amended, "because he says that the said several causes of action, and each and every of them, in the said amended declaration mentioned, are the same causes of action, and no other, than the said causes of action in the original declaration mentioned; and this the plaintiff prays may be inquired of by the country." This conclusion to the country was amended by leave of court, by substitution of a verification. To this second replication, the defendant filed a demurrer, which was overruled. Defendant abode by its demurrer. The case was tried on the issues presented by these pleadings, and a verdict and judgment were rendered against defendant for $1,000. At the close of the plaintiff's evidence, and at the close of all the evidence, defendant offered an

instruction directing a verdict in its behalf, but the court refused the instruction. From this judgment an appeal was prosecuted to the Appellate Court, where the judgment has been affirmed. The present appeal is prosecuted from the judgment of affirmance so entered by the Appellate Court.

The appellant argues, first, that the second replication, as amended, containing no averment of fact, was bad, and the demurrer thereto should have been sustained; and, second, that the declaration as amended, was, in legal effect, the commencement of the suit, because it introduced a new and distinct cause of action from that in the original declaration, and, therefore, the Statute of Limitations having run before the amendment was filed, this suit is barred.

It is not necessary to determine whether there was error in overruling the demurrer to the second replication, for, granting that there was error, the record shows that it resulted in no injury to this appellant. If the court had sustained the demurrer, the trial could have proceeded on the issue formed by the first replication to the plea, and no different result would have ensued. This will appear more clearly, after stating the pleadings. The plaintiff filed an amended declaration, to which the defendant filed the general issue, and also a plea of the Statute of Limitations, in which it was averred that the cause of action mentioned in the declaration did not "accrue to the plaintiff within two years next before the commencement of this suit, to wit, the filing of said declaration as amended." The first replication filed by the plaintiff then averred that the action "did accrue to him within two years next before the commencement of this suit." By this pleading, issue was joined on the question whether the action accrued within two years next before the commencement of this suit. That issue was a mixed question of law and fact. It was for the jury to determine when the injury occurred, and for the court to determine whether the suit was commenced at the time the summons issued, or at the time the amendment to the declaration was filed. The jury found that the injury occurred on the 28th of September, 1891, and the court must have

found that the suit was commenced at the issuance of the summons; otherwise, it would have directed a verdict for the defendant, as requested by the appellant at the close of the plaintiff's case, and again at the close of all the evidence. It does not appear that any harm could have come to the appellant by reason of the court's ruling as to the pleadings. If the objection is that the question of identity of causes of action was submitted to the jury instead of to the court, that objection is without force, in the face of the fact that the court itself passed upon the question when it refused the peremptory instruction.

The appellant insists that the error was not harmless, for the reason that, if the second replication had been held bad, the defendant would have been clearly entitled to an instruction directing a verdict in its favor, because the issues found on the first replication were clearly with defendant. In support of this contention, it is urged that the issues formed by the first replication to the plea of the Statute of Limitations was whether or not the amendment was filed within two years after the happening of the accident. We do not so consider it. The plea contains the averment that the cause of action did not "accrue to the plaintiff at any time within two years before the commencement of this suit, to wit, the filing of said declaration as amended." In the replication it is averred that the cause of action "did accrue within two years next before the commencement of this suit." That replication does not in any manner aver that the action accrued within two years next before the filing of the amendment, and the plea can not be considered as declaring the action did accrue within two years next before the filing of the amendment, unless it be granted that the filing of the amendment was the commencement of the suit, and that is just the question to be determined. The situation, in short, is this: The defendant, in the plea of the Statute of Limitations, averred that the action arose more than two years before the commencement of this suit. It then added, "to wit, the filing of said declaration as amended." Of course, this addition implied that in the

mind of the pleader the filing of the amendment was the commencement of the suit, and this was a question that he now insists was a matter of law for the court. When the plaintiff's replication was filed, it traversed the averment in the plea, so far as it alleged that the action accrued more than two years before the commencement of the suit, but did not traverse the legal conclusion of the defendant that the filing of the amendment was the commencement of the suit.

Upon this state of the pleadings, the appellant insists that, because the uncontradicted proof shows that the action accrued more than two years before the amendment was filed, it was entitled to the instruction directing a verdict in its favor. That such a contention hardly deserves the consideration we have given to it will readily appear when we summarize the position of the appellant. It contends that an issue was formed and proved in its favor, when, in truth, the fact that it contends was in issue was not asserted by the plaintiff at all, and unless we give a mere legal conclusion, namely, that the filing of the amendment was the beginning of the suit, the force of a negative averment, there was no such issue. We conclude, therefore, that any error that may have been committed in overruling the demurrer to the second replication was harmless, the issues of fact being properly formed by the general issue, the special plea and the first replication thereto, and the question of law having been passed on by the court in his refusal to give the peremptory instruction requested by appellant.

The principal question for our determination is raised by the second contention of the appellant. It is urged that the amendment to the declaration introduces a new cause of action, and was barred by the statute of limitations, which had run previous to the filing of the amendment. The general rule of law applicable in this state is unquestioned. We have repeatedly held that, where an amendment introduces a new cause of action, it is regarded as a new suit, commenced when the amendment is filed, and the summons issued originally is ineffectual to toll the statute of limita-

tions, if in fact the amendment is filed after the expiration of the statutory period. Fish v. Farewell, 160 Ill. 236, 43 N. E. 367. Where, however, an amendment to a declaration introduces no new cause of action, but merely restates in a different form the same cause of action as set up in the original declaration, the suit is commenced at the time of the issuance of the original summons, and the filing of the amendment relates back to the date of the summons, and the statute of limitations is not a bar to the amendment. Chicago, Burlington & Quincy Railroad Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; Phelps v. Illinois Central Railroad Co., 94 Ill. 548; Wolf v. Collins, 196 Ill. 281, 63 N. E. 638; Chicago & Eastern Illinois Railroad Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096.

The original declaration in the case at bar states, in effect, that the plaintiff became a passenger on a certain train of the defendant on the railroad running on State street and was carried to a point between Thirty-eighth and Thirty-ninth streets on said State street, at which place the accident occurred. The amendment substitutes "Cottage Grove avenue" for "State street," so that, as amended, the declaration avers that he was a passenger on the Cottage Grove avenue line, and that the accident occurred on Cottage Grove avenue between Thirty-eighth and Thirty-ninth streets. The bare question before us is, did such an amendment introduce a new cause of action?

Counsel for appellant cite numerous cases and text authorities on the proposition that even in transitory actions the allegation of place, if matter of description, is material, and must be proved as laid. This is undoubtedly a correct statement of the law as laid down in Wabash Western Railway Co. v. Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 111, and Lake Shore & Michigan Southern Railway Co. v. Ward, 135 Ill. 511, 26 N. E. 520, and would be applicable to the case at bar if we were called upon to determine whether there was a variance between the facts as proved on the trial and the allegations of the original declaration. The question before us is whether a new cause of action

was introduced by an amendment which alleged a different plea as the occurrence of the inquiry from that alleged in the original declaration. It might well be true that the facts proved under that amendment were at variance with the allegations of the original declaration, and still it would not necessarily follow that the allegations of the amendment introduced an entirely new and distinct cause of action. This is evident from the nature of a variance. Take the case of several counts in a declaration. The very object of stating the same cause of action in different counts is to prevent a variance. Because the proof corresponds, let us say, to the third count, and is at variance with the first and second, it does not follow that the first and second counts set up a new and distinct cause of action from that contained in the third. We think this will demonstrate clearly that there is a broad distinction between the cases of variance and cases where a new cause of action is introduced. In Swift & Co. v. Foster, 163 Ill. 50, 44 N. E. 837, this court said (page 52, 163 Ill., and page 838, 44 N. E.): "The negligence of the defendant, whereby the death of Mullen was caused, might well be stated in different ways in the several counts, in order to prevent a variance between the allegation and proofs, without setting up different and distinct causes of action." The distinction may be illustrated in another way. A plaintiff must allege and prove every element that constitutes his cause of action; and the converse is true—that elements constituting a cause of action are those that must be alleged and proved. In the case at bar the venue was laid with certainty, and it was not necessary to allege with particularity the descriptive matters of place; but having been laid, it was necessary, in order to prevent a variance, that they be proved as laid. An unnecessary allegation never becomes an element of a cause of action, and yet an unnecessary allegation must frequently be proved as laid, to prevent a variance. The allegation, with particularity, of the street upon which the injury occurred, was altogether unnecessary. The declaration laid the venue in "Cook county, Illinois," and it would

have been a legally sufficient statement to have alleged that the injury occurred in the "county aforesaid." Read v. Walker, 52 Ill. 333; St. Louis, Jacksonville & Chicago Railroad Co. v. Thomas, 47 Ill. 116. In St. Louis, Jacksonville & Chicago Railroad Co. v. Thomas, supra, the action was for killing stock at a place where the company was required to fence. The venue was "at the circuit aforesaid;" averring that the defendant was then and there a corporation, and operating a railroad, etc. In that case we said: "The declaration contained three counts, to which a demurrer was filed and special causes were set down. The first is the want of a venue of the injury. The caption or title of the declaration is 'State of Illinois, Morgan County.' The averment is that the company 'was then running divers locomotive engines and railroad cars, operated in and upon said railroad track, by the servants and agents of said railroad company, and the said defendant so operating said locomotives and cars in and upon said railroad track, on the day and year aforesaid, ran said locomotive and cars against and upon one steer, the property of the plaintiffs, and then and there killed said steer.' While this is not accurately formal pleading, we think that the 'then and there' obviously refers to the time and place previously mentioned, and, as but one date and the name of but one place had preceded this averment, they were referred to; and Morgan county being named in the caption to the declaration, it was thus named as the venue. In the second and third counts the venue is referred to as being at the 'circuit aforesaid.' This answers the rule of pleading that every traversable fact must be laid with a venue. It is true, this is but form; but appellants, as they had a right to do, objected for the want of form, by setting it down as a special cause in their demurrer. This ground of demurrer was not well taken." Upon this question, Tidd, in his Practice (page 432), says: "In an action upon the case for a nuisance, if no place be alleged where the nuisance was committed, the county in the margin shall be intended; and, in stating transitory facts, it is enough to

allege a county for a venue, without a parish." In his Pleading, Chitty says (page 249): "But in civil actions in the Superior Courts, as the jury is no longer de vicineto, the statement of a county alone, or that the contract was made in London, without laying a parish or ward, suffices, unless where a local description is necessary, as in replevin," etc.

The allegation of the particular street being unnecessary, could not become an element of the cause of action, for, as we have already pointed out, only those matters are elements of a cause of action which it is necessary for the plaintiff to allege and prove. The question is therefore narrowed to this: Did an amendment substituting one unnecessary and non-essential allegation for another just as unnecessary and just as non-essential to the cause of action introduce a new and distinct cause of action? We think the answer is clear that it did not. The right, duty, injury, and liability are all precisely the same. It sets up the same right of the plaintiff to be secure from injury, the same duty of the defendant to observe that right, and, in the same words, the same breach of that duty and same violation of that right.

The case of Cicero & Proviso Street Railway Co. v. Brown, 89 Ill. App. 318, was a personal injury case. The original declaration stated that the defendant operated a railway on the streets of Chicago, but did not specify the street on which the line in question was operated. It stated that the injury occurred at the intersection of said railway and Fiftieth street. The first additional count alleged that the line was on Lake street, and that the injury occurred at Fifty-first street. The second additional count alleged that the line was on Lake street, and that the injury occurred at Fiftieth street. The statute of limitations was interposed, it being contended that the additional counts set up a new cause of action. The court said (page 321): "At most, this proof could only amount to a variance from the allegation of the first additional count, and not a failure to prove the substance of the cause of action stated in the

declaration. In actions of this class the cause of action is the act or thing done or omitted to be done by the one which confers the right upon another to sue; in other words, the act or wrong of defendant towards the plaintiff which causes a grievance for which the law gives a remedy." In Stevenson v. Mudgett, 10 N. H. 338, 34 Am. Dec. 155, the court says: "The cause of action in both counts is a contract for the delivery of certain cattle, and a breach of that contract. The particulars of time and place set forth in the amended count are materially different from those in the original, and the additional averments are founded upon matter superadded by a further contract between the parties after the original agreement was entered into. But it was upon a breach of the contract as modified that the plaintiff brought this suit, and he asked by his amendment to perfect his declaration, so that he might be able to prosecute it and recover for that breach. In this view of the case, the amendment was rightly admitted. The form of the action is not changed, and the identity of the cause is preserved." In Alabama Great Southern Railroad Co. v. Thomas, 89 Ala. 294, 7 South. 762, 18 Am. St. Rep. 119, the court said: "The various amendments allowed to the complaint do not, in our opinion, introduce a new cause of action, different from that stated in the original count of the complaint. The gravamen of the action is an injury caused to twelve head of cattle shipped by the plaintiff on the defendant's railroad on April 29, 1886, which injury was alleged to be the result of the defendant's negligence. The several amendments each make a case based on some alleged violation of duty growing out of the undertaking to ship these same cattle. They may correct a misdescription of the contract as to the agreed point of destination of the cattle, or otherwise cure an imperfect statement of the same subject-matter, or add new averments of facts more clearly showing the negligence complained of or otherwise altering the grounds of recovery, or varying the alleged mode in which the defendant has violated his duties growing out of the agreement embraced

in the bill of lading; but they go no further. The identity of the matter upon which the suit is founded is fully preserved. The amendments all fall with the lis pendens proper, and only subserve the purpose of accomplishing substantial justice between the parties, and of deciding the pending controversy on its real and true merits. This is the main design of all statutes allowing amendments to pleadings. The statute of limitations of one year was, for these reasons, no sufficient answer to the new counts added to the complaint by way of amendment."

In many states an amendment which introduces a new cause of action can never be made. In such states the decisions as to whether an amendment introduces a new cause of action are in point. In Pennsylvania a declaration can not be amended so as to introduce a new cause of action. Tatham v. Ramey, 82 Pa. 130. But an amendment was allowed changing the state in which a contract was alleged to have been made. Trego v. Lewis, 58 Pa. 463. And generally, in such states, "amendments which change the alleged date of the contract or the sum to be paid, or correct a misdescription of the contract in other respects, or change any particular of the matter to be performed, or the time or manner of performance, so long as the identity of the matter upon which the action is founded is preserved, are not obnoxious to the rule." 1 Ency. of Pl. & Pr. 558.

We are convinced that the amendment, although varying the details of place of the substantive claim, counted upon precisely the same rights, duties, and violations as were alleged in the original declaration, and that accordingly no new cause of action was introduced.

We have carefully examined the authorities cited and relied upon by appellant. The sole question there was one flict with the views herein expressed, and are clearly distinguishable from the case at bar. The case of Wabash Western Railway Co. v. Friedman, supra, is among those relied upon by appellant. The sole question there was one of variance. The action was for a personal injury to a passenger. The averment in the declaration as to the lo-

cation was that the defendant company was operating a railroad from Kirksville, Mo., to Glenwood Junction, Mo., and that the plaintiff, Friedman, became a passenger at Kirksville to be carried thence to Glenwood Junction. The plaintiff testified that he boarded the train at Moberly, Mo., to go to Ottumwa, Iowa. This evidence was objected to. It was insisted, for the company, there was a variance between the averment and the evidence as to how the relation of passenger and carrier arose, and an instruction to that effect was offered and refused. This court reversed the case, and held there was a variance. In that case, inter alia, it is said (page 592, 146 Ill., and page 356, 30 N. E.): "It may be true that plaintiff stated more in his declaration than he might have stated; that he might have relied upon an allegation that he was a passenger upon defendant's cars, being carried for reward, without stating definitely the termini of his journey on defendant's line of road. But, having gone into detail in his allegations, the law requires him to prove them as laid." If the averment of the termini of the journey might have been omitted, and the general statement of the relation been held sufficient, it cannot be upon any other theory than that such averment was not essentially a part of the plaintiff's case. If Friedman, after the evidence was in, had amended his declaration by striking the unnecessary and descriptive part, no assignment of error could have been sustained because of the variance, and his declaration would have supported the verdict. The case of Wisconsin Central Railroad Co. v. Wieczorek, 151 Ill. 579, 38 N. E. 678, is not authority in the case at bar. That was an action for an injury to real estate from the construction and operation of a steam railroad in a street in front of and adjacent to the plaintiff's premises; part of the injury charged being the obstruction of the street with trains. The evidence showed that the railroad in a street in front of and adjacent to the plaintiff's by this court that in an action such as that, the description of the locus in quo is legally essential to and of the substance of the action, for the reason that upon the proximity

of the railway to the premises must, in a degree, depend the damage, and that a description must be given from which it could reasonably be inferred that injury might probably ensue to property claimed to be damaged. In the case at bar, the injury of appellee, either in its character or extent, was in no way dependent upon any particular place or street, or along any part of appellant's line or lines of street railway. The distinction made in the above case is also applicable in the case of Derragon v. Rutland, 58 Vt. 128, 3 Atl. 332, which was an action for damage to land from the construction of a sewer. The narr., without particular description of the sewer, averred that a certain sewer constructed by the defendant, the town of Rutland, was built in 1872, etc. The evidence disclosed that there were two sewers built by the defendant near the land of the plaintiff—one constructed in 1872, and one in 1882—and that the latter was the cause of the injury. The locus in quo was material, and there was a variance. And so we might, in each of the cases cited, point out clear distinctions, as we think, from the contested point in this case.

We find no reversible error in the judgment of the Appellate Court, and that judgment is affirmed. Judgment affirmed.

(61) GILMORE v. CITY OF CHICAGO.
224 Ill. 490; 79 N. E. 596 (1906).

On February 9, 1901, Kittie Gilmore, the appellant (hereinafter referred to as plaintiff), brought an action of case in the superior court of Cook county against the city of Chicago, the appellee (hereinafter referred to as defendant), to recover damages for personal injuries sutained by her on February 4, 1900, and which were occasioned by stepping into a hole in a sidewalk. On March 20, 1901, she filed a declaration consisting of one count, which alleged that the defendant, on February 4, 1900, 'was possessed and had control of a certain public sidewalk on the north side of a certain public street called 'Thirty-eighth Street,' at

and near to the intersection of said Thirty-eighth street with Princeton avenue and between Princeton avenue and Shields avenue, in said city, in the county aforesaid," that defendant, in violation of its duty to the plaintiff, negligently suffered the same to be and remain in bad and unsafe condition, so that the plaintiff, while passing, had her left foot caught in an opening in said sidewalk, whereby she was seriously and permanently injured. On September 21, 1904, the plaintiff filed an additional count, which is substantially the same as the original count, the only difference being in the phraseology. The defendant interposed the general issue to each of these counts.

Thereafter, on October 5, 1904, the plaintiff by leave of court, amended the original declaration and the additional count by striking out the words "Princeton avenue" wherever the same therein occurred and inserting in lieu thereof the words "Stewart avenue." To the original and additional counts, as thus amended, the defendant filed the general issue and a plea setting up the statute of limitations. The defendant filed a similiter to the general issue and demurred to the plea of the statute of limitations. The demurrer was sustained, and the defendant stood by its special plea, and went to trial upon the general issue. The jury returned a verdict for $3,000 in favor of the plaintiff, and the court, after overruling a motion for a new trial, entered judgment upon the verdict for $3,000. From that judgment the defendant appealed to the Appellate Court for the first district. That court reversed the judgment of the superior court without remanding the cause, and incorporated in its judgment the following finding of facts: "And the court, upon the allegations and proofs in the record in this cause contained, doth find as facts that the description of a place as follows: "The north side of a certain public street called "Thirty-eighth Street," at and near to the intersection of said Thirty-eighth street with Stewart avenue and between Stewart avenue and Shields avenue, in said city,' is not the same as or included within the description, "the north side of a certain public street called

"Thirty-eighth Street," at and near to the intersection of said Thirty-eighth street with Princeton avenue and between Princeton avenue and Shields avenue, in said city, in the county aforesaid.' Also, that the said first above quoted description is not the same as or included within the description, 'a certain public highway known as "Thirty-eighth Street," at or near the intersection of Thirty-eighth street with Princeton avenue and between Princeton and Shields avenues, in the city of Chicago.' Also, that the description of a place as follows: 'A certain public highway known as "Thirty-eighth Street," at nor near the intersection of Thirty-eighth street with Stewart avenue and between Stewart and Shields avenue, in the city of Chicago,' is not the same as or included within the description, 'the north side of a certain public street called "Thirty-eighth Street," at or near to the intersection of said Thirty-eighth street with Princeton avenue and between Princeton avenue and Shields avenue, in said city.' or the same as or included within the description, 'a certain public highway known as "Thirty-eighth Street," at or near the intersection of Thirty-eighth street with Princeton avenue and between Princeton and Shields avenues, in the city of Chicago.' Also, that Princeton avenue, Shields avenue and Stewart avenue run north and south in the city of Chicago, parallel to each other; that Shields avenue is east of Stewart avenue and west of Princeton avenue, and that Thirty-eighth street runs east and west in the city of Chicago, at right angles with the direction of Princeton, Shields and Stewart avenues."

The plaintiff appealed to this court, and urges that the Appellate Court erred in making the finding of facts and in reversing the judgment of the superior court.

Scott, C. J. Manifestly, the judgment of the Appellate Court reversing the cause was based upon the finding of facts above set out. The facts so found related solely to the question whether the amended counts stated a cause of action different from that set up in the original and additional counts, that being the question presented by the de-

murrer to the plea of the statute of limitations filed herein, and when the judgment and finding of facts are considered together it seems apparent that the Appellate Court reversed the judgment of the superior court on the ground that the cause of action set up in the amended counts was not the same cause of action stated in the original and additional counts, and that as the amendments were not made until more than two years after the cause of action stated by the amended declaration had accrued, the statute of limitations, which was set up by the defendant's plea, was a bar to the action. The question presented by the demurrer to the plea of the statute of limitations was one of law, viz., whether the amendments to the original and additional counts introduced another and different cause of action from that set up in those counts as originally filed. That question of law, upon the demurrer, could only be determined by an inspection of the original and amended declarations. Plaintiff concedes that, by language used in the various counts, the defective sidewalk is located in one place by the original and additional counts and in another place by the amended counts. We are of opinion that a cause of action was stated by the amended counts other and different from that stated by the original and additional counts. As suggested by the Appellate Court, there might be no sidewalk in one place, and consequently no duty in reference to its repair, while there might be a sidewalk in the other place with a duty regarding its maintenance.

In the case of Chicago City Railway Co. v. McMeen. 206 Ill. 108, 68 N. E. 1093, to which our attention has been called, the wrong charged consisted in negligently managing and controlling a certain train, of street cars in such a manner that it ran into another street car upon which the plaintiff was a passenger, causing the injury complained of, and that negligence was the same whether it occurred on State street, as charged by the original declaration, or on Cottage Grove avenue, as charged by the amended declaration. Here the negligence averred consisted in a violation of a duty to properly maintain a sidewalk. Neglect

to keep a sidewalk in repair at one place is not the same wrong as neglected to keep a sidewalk in repair at another place, and this case is therefore readily distinguished from the McMeen Case. The act of negligence charged by the original and additional counts in the case at bar is a different act of negligence from that charged by the amended counts. This precise question does not seem to have heretofore arisen in this state, but in the consideration of an analogous proposition the court of last resort in Vermont, reached a conclusion in accord with that above stated. Derragon v. Rutland, 58 Vt. 128, 3 Atl. 332.

No replication was filed to the plea of the statute of limitations. The trial court sustained a demurrer to that plea and no leave was obtained to plead over. There was, therefore, no issue of fact in the trial court involving the statute of limitations. Section 88 of chapter 110, Hurd's Rev. St. 1905, only authorizes the Appellate Court to recite in its final order, judgment or decree the facts as found by it, where the final determination of a cause "shall be made by the Appellate Court, as the result wholly or in part of the finding of the facts concerning the matter in controversy, different from the finding of the court from which such cause was brought by appeal or writ of error." The words "matter in controversy," in this section, mean matter of fact in controversy. The Appellate Court is not authorized to make a finding of facts that is not responsive to any issue of fact raised in the trial court, and upon such finding of facts reverse the judgment of the lower court without remanding the cause. The trial court did not make, and could not have made, any finding of facts whatever in relation to whether the defective sidewalk described in the original and additional counts was located at the same place as the defective sidewalk described in the amended counts, as no such question of fact was presented in that court, and it follows, as a matter of course, that the recital of facts contained in the final judgment of the Appellate Court is not, within the meaning of the statute, "different from the finding" of the superior court. If the ground upon which

the Appellate Court reached its judgment was, as seems evident, that the plea of the statute of limitations presented a good defense, that court should have reversed the judgment of the superior court and remanded the cause, with directions to the lower court to overrule the demurrer to that plea. If the Appellate Court reached its judgment, however, by reason of a finding of facts, on any issue of fact which was joined in the superior court, different from the finding of the superior court, then such finding on that issue of fact should be recited in the judgment in the Appellate Court. Inasmuch as the finding of facts of the Appellate Court was one which that court had no power to make, and inasmuch as the judgment of that court is not warranted by that finding, that judgment will be reversed and the cause will be remanded to the Appellate Court for further consideration of the errors assigned by the city of Chicago in that court, and for the entry of such judgment, not inconsistent with this opinion, as to the Appellate Court may seem just.

Leave is given to withdraw the record of the superior court filed in this court for the purpose of refiling it in the Appellate Court.

Reversed and remanded.

(62) MACKEY v. NORTHERN MILL CO.
210 Ill. 116; 71 N. E. 448 (1904).

Ricks, C. J. This is an action on the case, brought by Lizzie Mackey, administratrix of the estate of Thomas Mackey, deceased, to recover damages for the alleged negligence of appellee, which, it is claimed, resulted in the death of said decedent. The original praecipe and summons in said suit were issued January 14, 1896, and declaration was filed March 9, 1896. On October 18, 1899, an amended declaration, similar to the first, was filed. On trial had in November, 1900, a verdict for $5,000 was obtained in favor of plaintiff, but on appeal to the Appellate Court for the First District said judgment was reversed on the ground

that the declaration in the case did not state a good cause of action. The case being remanded for a new trial, the cause was redocketed, and on March 4, 1902, plaintiff obtained leave to file, and filed instanter, a new amended declaration. To this declaration defendant filed, among others, the plea of the statute of limitations, to which plaintiff demurred. The demurrer was overruled, and plaintiff stood by the demurrer, and appealed to the Appellate Court, where the judgment of the lower court was affirmed, and plaintiff prosecuted this further appeal.

The controlling question here is whether there was error in overruling the demurrer to the plea of the statute of limitations. Appellant contends that the second count of the first declaration filed sets forth a good cause of action. The material portion of that count, which, it is claimed, states a good cause of action, is as follows: "The said Northern Milling Company was the owner of or using and operating a certain mill in the County of Cook and State of Illinois, and in connection therewith used a side track for the purpose of loading and unloading material, and employed there the said Thomas Mackey, deceased; and that the said Thomas Mackey on, to wit, the 5th day of March, 1895, was lawfully upon the side track adjoining the said mills of the said Northern Milling Company, and while the said Mackey was so lawfully on the side track near the said mill, and in the exercise of all reasonable and proper care for his own safety, the said Northern Milling Company, by its agents and servants, who were then and there not fellow-servants of the said Mackey, pushed an unloaded car upon him, without giving any notice to the said Mackey that they were about to push the said car where he then and there was; and without making any sound or warning, or ringing any bell, or in any manner advising the said Mackey of any impending danger to him, the said Northern Milling Company pushed the said car upon and against said Mackey, and crushed him, so that his body was caught between the said mill and the said car, and he was then and there killed." It is a well-established rule that a declara-

tion, in cases of this character, must state facts from which the law raises a duty from the master to the servant, and if the declaration fails in this regard then it is insufficient to support a judgment. As stated in Ayers v. City of Chicago, 111 Ill. 406, "The pleader must state facts from which the law will raise the duty." And as said in Cooley on Torts (2d Ed.), 791: "The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed." And Mr. Thompson, in his work on Negligence (2 Thompson on Negligence, 1244) says: "Unless the duty results in all cases from the stated facts, the declaration so framed will be bad."

Do the facts stated in the count above mentioned show a duty on the part of the appellee to appellant, and its violation? It is alleged that appellant's intestate was in appellee's employ; that he was lawfully on the side track, and in the exercise of reasonable care, when appellee's servant, not a fellow-servant of the said Mackey, pushed an unloaded car along said side track and upon the said Mackey without giving him any notice or warning. This might all be true, and still appellee not be liable for any violation of duty or any negligence. It is not stated that said Mackey's duties necessarily required him to be on the side track at the time of the accident, or that he was performing any duty he owed appellee, or that appellee had any reason to believe or suspect that said Mackey would be there in a position of danger. The fact that Mackey was in appellee's employ raises no presumption that his employment required him to be in the place where he received his injury. For aught that appears, he may have gone there of his own volition, and not in the discharge of any duty, or even gone there without permission, and certainly without notice to appellee, or without any reasonable ground for appellee suspecting that he might be of being negligent. Any employee might lawfully be on the on the track is not sufficient to put appellee in the attitude of being negligent. Any employee might lawfully be on the track in question, and still appellee could not, for that

reason alone, be held to have knowledge of his presence when he should happen to be there. There is no allegation as to what Mackey's duties were, and it does not appear that he had any right or reason to depend upon or rely on any notice being given him of the approach of the car; nor are facts stated from which it may be determined that appellee, by the exercise of ordinary care, could have foreseen the presence of Mackey, or the danger likely to result from the pushing of the car. In 16 Am. & Eng. Ency. of Law (1st Ed.) 439, it is said: "It cannot be held negligent unless the defendant, by the use of ordinary care, under the circumstances, could have foreseen that it might result in some injury to some person." If appellee had no reason to suspect Mackey being in a position of danger, the exercise of ordinary care would not have enabled it to foresee the injury. In the absence of averments showing that appellee owed Mackey some duty which was violated, and because of such violation said Mackey was injured while in the exercise of due care, the declaration must be held not to state a cause of action.

The amended declaration, on which the trial was had, was not filed until March 4, 1902, and the injury was occasioned on March 5, 1895—almost seven years prior. To this last amended declaration the plea of the statute of limitations was filed and upon demurrer said plea was held to be sufficient, which, we think, was proper. Appellant contends that, even though the first declaration be held to be bad, yet this amended declaration relates back to the original summons in the case, and should not be regarded as a new and separate cause of action. This identical question has been so clearly and repeatedly passed upon by this court that a new discussion of the proposition would seem to be useless. In the case of Eylenfelt v. Illinois Steel Co., 165 Ill. 185, 46 N. E. 266, practically the same questions were presented and the same arguments advanced as in the present case, and the contentions here urged by the appellant were rejected. We there said (page 187, 165 Ill., and page 266, 46 N. E.): "As will be observed, the

plaintiff was injured on the 17th of January, 1892, and suit was brought on the 29th day of the following March. What purported to be a declaration was filed, but it stated no sufficient cause of action. No declaration was filed stating a cause of action until January 31, 1895—more than three years after the accident, and more than one year after the statute of limitations had run; and the question presented by the record is whether the statute of limitations was a bar to the action when the amended declaration was filed on the 31st day of January, 1895. * * * The question, then, presented by the record before us is whether the counts filed by the plaintiff in January, 1895, after the two years provided by the statute for bringing an action had expired, set up a new cause of action, or whether they were a mere restatement of the cause of action already stated in the declaration. Upon an inspection of the declaration first filed by the plaintiff, it will be found that the commencement of the declaration is in proper form in an action of trespass on the case, and no fault is found with the conclusion of the declaration wherein damages are claimed; but when the body of the declaration is examined, where the cause of action should be set up, no cause of action whatever is averred in the declaration. The amended count, does, however, set up a cause of action, but, inasmuch as the original declaration set up no cause of action, it seems to follow that the amended declaration stated a new cause of action—one which had never been stated before—and hence the statute of limitations was a good defense. There could be no restatement of a cause of action by the amended declaration unless the cause of action had been stated before." It was also contended in that case, as here, that issuing of the summons arrested the running of the statute of limitations, and the filing of the amended declaration related back to the commencement of the suit; but the contention was denied, and it was said: "A declaration was filed before the statute had run, but the amended declaration, which set up the cause of action upon which issue was joined and a trial had, was not filed until the statute of

limitations had run; and all the cases agree that, if the cause of action set up by the amendment is a new one, and not a mere restatement of the cause of action set out in the original declaration, the amended declaration will not relate back to the commencement of the suit."

Counsel for appellant cite authorities to support a different rule from that above announced, but in our judgment, there is no conflict in the decisions of this court upon this proposition.

Counsel for appellant argued that an adherence to the rule thus established will work a hardship to appellant, who may thus be precluded from prosecuting a meritorious cause of action. The same argument would apply equally as well if appellant had failed to institute any suit at all until after the statutory period, and then the statute should be pleaded. In the minds of the legislature, at least, the limitation was thought to be a wholesome one; and while it remains as a part of our statutes it is our duty to construe and apply it according to its evident meaning. More than one cause of action might grow out of the same injury, and it cannot be consistently contended that the statute does not bar all actions not instituted within the limitation. If, as we hold, the first declaration filed by appellant did not state any cause of action, then it must follow that, if the declaration that was filed on March 4, 1902, did state a cause of action, it was a new or different cause of action, and, not being within the limitation of the statute, was thereby barred.

Appellant further contends that "appellee waived its right to raise the question of injecting a new action" by failing to object and except to the filing of the amended declaration. This objection appears to be urged now for the first time; hence, if otherwise available, appellant is now precluded from insisting upon it. But we think appellant is wrong in the contention that appellee's plea of the statute of limitations came too late. This same contention was made in the case of Chicago City Railway Co. v. Cooney, 196 Ill.

466, 63 N. E. 1029, and we held the contention not well taken.

Appellant further insists that it has been adjudicated that a new action has not been injected into this case, and cites section 23, c. 110, Hurd's Rev. St. 1903, which says that an adjudication of the court allowing an amendment is conclusive as to whether or not it is the same action. This point was also raised in the case of Chicago City Railway Co. v. Cooney, and we there stated that it was "our opinion that said section 23 was not intended to apply to a question of this kind." In the case of Fish v. Farwell, 160 Ill. 236, 43 N. E. 367, the same question was also thoroughly discussed, and an insistence similar to that of appellant in the present instance was rejected, with the reasons therefor, which it is not necessary for us here to repeat.

In our opinion the judgment of the Appellate Court is correct, and the same will be affirmed. Judgment affirmed.

(63) WABASH R. R. CO. v. BHYMER.
214 Ill. 579; 73 N. E. 879 (1905).

Ricks, C. J. Appellee recovered a judgment in the Superior Court of Cook County against the appellant for $8,000 for personal injuries received by appellee while employed as a fireman on one of appellant's freight trains. The Appellate Court affirmed the judgment, and the present appeal is prosecuted from the judgment of affirmance. A brief statement of the facts will lead to a better understanding of the matters herein passed upon:

Early in the morning of December 9, 1899, a freight train known as "No. 3-64," north bound, left Marley, a station on appellant's road, ten or twelve minutes ahead of another freight train bound in the same direction, known as "No. 94." The latter train was a double header, pulled by two engines coupled together at the head of the train. Appellee was the fireman upon the second of said engines. His train No. 94, consisted of twenty-eight loaded cars. It was a train of the first class with respect to rights, while train

No. 3-64 was carrying coal and was of the third class, and consisted of twenty cars. At Marley a hot box was discovered on train No. 3-64, about nine cars forward of the caboose. The box was cooled off and repacked, and a bag filled with water placed upon it, so as to have a continual dropping of water on the journal. This was the usual method for remedying the defect caused by hot boxes. Marley is thirty miles from Chicago, and the trains in question were running upon the Chicago branch of appellant's road. After cooling the box the train proceeded, and reached Orland, a station seven miles north of Marley, where the conductor gave to the engineer the "go ahead" signal. Just after passing Orland the box was found to be again hot, and the conductor and rear brakeman began signaling the engineer to stop by swinging their lanterns from the sides of the caboose, and this was kept up until the train came within a mile of Worth, a station in Cook county, five and one-half miles from Orland, at which point the fireman on train No. 3-64 observed the signals and informed the engineer. It was the duty of the engineer to look out for signals. When the engineer was informed of the signals he applied the brakes, but, as the train was running at the rate of sixty miles an hour, before it could be stopped the heat caused the journal to twist off and drop to the ground, wrecking the cars and tearing up the track. The latter nine cars went into a ditch. The caboose was turned over and the lights extinguished. Train No. 94 was following in the rear of the wrecked train, and was about twenty-five minutes behind time. The evidence tends to show that there were fusees in the caboose of train No. 3-64, which might have been lighted and thrown out for the purpose of warning No. 94 of danger, but they seem to have been forgotten. A fusee is an extra danger signal, which makes a strong red light and can be seen at least a mile. As soon as the caboose of No. 3-64 was turned over, the conductor and brakeman got out of it, and the conductor took a torpedo with him and started back to signal No. 94 to stop. On his way he took a switch light from a stub switch a short dis-

tance from Palos Springs, placed a torpedo on the track, and with the lantern signaled the oncoming train (No. 94) to stop. As the train reached him he threw his lantern at the cab of the front engine but the lantern passed over it and lodged upon the second engine between the guides on the water drum, where it was afterwards found. The view of the fireman on the first engine of No. 94 was somewhat obstructed by the head brakeman, who had entered the engine and was sitting in the seat box on the engine. No one on No. 94 seems to have seen the light of the signal, but when the engine struck the torpedo and it exploded the brakes were applied. Train No. 94 was running downgrade at a high rate of speed, and before it could be stopped reached the point where the rails were broken and displaced, and it was ditched and appellee injured. Prior to the wrecking of the first train the track was in good and safe condition and the roadbed well ballasted.

The declaration, as finally amended, contained five counts —the original and four additional counts. The first count, filed September 21, 1900, charged that appellee was an employ of appellant, in the line of his duty, on a certain engine drawing a freight train in the night time; that it was dark, and it was defendant's duty to have and keep its track in safe condition for travel by trains; that defendant negligently caused and permitted the track and certain rail or rails to become detached and loosened and displaced, that defendant had notice; that plaintiff was exercising due care; that in consequence thereof the locomotive left the track and plaintiff was injured. November 30, 1901, appellee filed two additional counts. The first alleged the relation, time, and employment, and the duty of defendant to keep the track safe for travel; that a certain other locomotive and train had prior thereto become wrecked and were lying opposite the track, and had thereby detached, loosened, and displaced certain rails; that defendant knew plaintiff was upon the train riding towards said point, and it was its duty to warn plaintiff of such displacement, but it failed to do so, in consequence of which the locomotive carrying plaintiff left

the track and plaintiff was injured. The second additional count alleged the relation of the parties, and that defendant was operating two trains, with certain engines, between Palos Springs and Worth; that plaintiff was upon an engine drawing one of said trains in the night, and that it was the duty of defendant to keep its track in safe condition; that defendant negligently caused, suffered, and permitted a certain other locomotive and train to become wrecked and the rails loosened and displaced; and that because of such negligence of defendant the locomotive upon which plaintiff was riding left the track where the rails were displaced, and plaintiff was injured.

On March 27, 1902, after the trial had proceeded to the close of all the evidence, and more than two years after the injury, the appellee filed two more (the third and fourth) additional counts to his declaration. The third charged that the defendant owned the railroad and was operating and running certain engines and cars over the same towards the town of Worth; that plaintiff was defendant's servant, and upon an engine drawing a train along said track in the night time, and that it was defendant's duty to keep its track safe for travel; that defendant "negligently so operated the certain other train in such a way and manner as to permit and cause said certain other locomotive and train of cars to be wrecked upon and along said track there," and thereby detached, loosened, and displaced certain rail or rails from the ties; and that because of such negligence of defendant, and without want of care of the plaintiff, the locomotive on which plaintiff was, left the track, where the rails were displaced, and ran into a ditch, etc. The fourth additional count charged that defendant was a corporation and possessed of a railway; that plaintiff was in defendant's employ as its servant, and as such and in the performance of his duty was upon a certain engine, for defendant, drawing a train of freight cars over its line in the night, that it was defendant's duty to have and keep its track reasonably safe for travel; that a certain other locomotive engine and train of cars attached were being drawn along said track in the

same direction, but some distance in front of plaintiff's train, and said train was preceding the one on which plaintiff was riding, and "was so operated and conducted that it became necessary then and there to stop the same, and certain agents of defendant upon said train thereupon immediately endeavored, by the giving of signals, to stop said train, which signals were not obeyed, and said train failed to stop, and it thereupon became defendant's duty to warn plaintiff, who defendant well knew was riding on its train as aforesaid toward the point where said efforts were being made to stop said train as aforesaid, yet defendant negligently failed to warn plaintiff of the fact that said train must be stopped," and said defendant, by its servants, then and there failed to properly stop said train, and by such failure the same then and there became wrecked, and the track torn up and the rails displaced, and by reason of such failure to give such signals, as aforesaid, caused and suffered plaintiff, who, in the exercise of due care as a servant of defendant, was engaged in the performance of his duty in the management and operation of said locomotive and train, to be carried upon the same to and upon the place where said rails had become and were displaced, and because of such negligence the locomotive left the track, etc.

To the third and fourth additional counts the plea of the statute of limitations was interposed by appellant, and demurred to by appellee, and the demurrer sustained. The appellant elected to abide its plea, and the court ordered the general issue to stand as to all the counts, and the cause was submitted to the jury, with the result above mentioned.

The specific negligence alleged in the first count and first additional count is the failure of appellant to warn appellee that the rails were displaced. The second and third additional counts allege the specific acts of negligence as negligently suffering and permitting the first train to become wrecked and the track displaced. Want of notice to appellee is not charged in these counts. The fourth additional count alleges the negligence to be the failure of appellant

to warn appellee "of the fact that such train [meaning the first train] must be stopped," and no other negligence is relied on in that count as the ground of recovery. That this is so is made certain by the following allegation in the plea: "And by reason of such failure to give such signals, as aforesaid, caused and suffered plaintiff, who in the exercise of due care as a servant of defendant, was engaged in the performance of his duty in the management and operation of said locomotive and train, to be carried upon the same to and upon the place where said rails had become and were displaced." No signals or any place mentioned are pointed out in the plea, other than the signals from the agents upon the first train to the engineer in charge of that train, which, it is alleged, were not obeyed. There is no allegation in that count of any duty from it to give, or a failure to give, appellee any signals, except to warn him "of the fact that said [first] train must be stopped." The reference in the latter part of the plea by the words used, namely, "by reason of the failure to give such signals, as aforesaid," also confirms this view. The words "as aforesaid" must be held to refer to signals previously mentioned in the plea.

Was, then, the negligence charged in the fourth additional count the same as that charged in the first or original count, or the same as charged in the first or second additional count? In other words, is the charge of a failure to warn plaintiff that a certain rail or rails in the track is or are displaced the same as that a train ahead of him must be stopped? According to the allegations of the fourth additional count appellee's engine did not run into the train that was ahead of him before or after it was stopped. Appellee's train did run off the track and into a ditch by reason of the displacement of a rail by the train that he alleges ought to have been stopped, and alleges he ought to have been notified that "must be stopped." He alleges the train that "must be stopped" was wrecked because those in charge of it would not obey signals, and that it displaced the rails, but does not allege he had no notice of the displacement of the rails, or that he was entitled to any notice,

or that appellant had any notice thereof. The notice that he claims he was entitled to, under that count, was not that the train was wrecked, or that the track was displaced, nor was it that the train was stopped, but that it was necessary to stop it, and that certain agents of appellant on the said train were trying to give, or were giving, signals to the engineer thereof to stop, and that they were not obeyed, and that appellee was entitled to be warned that "efforts were being made to stop said train." This was all before the train ahead of appellee was wrecked and before the rails on the track were displaced, if the train ahead caused the displacement, as alleged. The counts relate to two different periods of time and to different chains of circumstances. The first count relates to circumstances and charges of duty before the wrecking of the first train, involving the discovery of the hot box at Marley, the packing and cooling of it, the discovery that it was again hot as the train passed Orland, the efforts of the conductor and rear brakeman to signal the engineer to stop, the latter's failure to see or heed the signals, and the failure of appellant's servants in charge of the first train, by throwing out fusees from the running train, to warn appellee that the first train "must be stopped." The second point of time covered by the counts filed within the two years begins with the wreck, and includes the displacement of the rails, the efforts of those in charge of the first train, by the use of the torpedo and lantern, to warn those in charge of appellee's train that the rails were displaced, and the efforts used by those in charge of appellee's train to comply after receiving the warning, and the injury.

One of the tests by which it is determined whether different counts constitute the same cause of action or different causes of action is whether the same evidence will support the different counts. Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Buntin v. Chicago, Rock Island & Pacific Railway Co. (C. C.), 41 Fed. 744. "The cause of action may be regarded as the act or thing done or omitted to be done by one which confers the right upon another to sue; in other words, the

act or wrong of the defendant towards the plaintiff which causes a grievance for which the law gives a remedy." Buntin v. Chicago, Rock Island & Pacific Railway Co., supra. Applying the evidence test to the case before us, and we are forced to the conclusion that appellant's failure to warn appellee that the first train must be stopped, which is the act charged as omitted to be done by appellant upon which appellee relies, and to which he attributes his injury, as alleged in the fourth additional count, would neither be admissible nor tend to support the charge that appellant failed to warn appellee of the displacement of the rail, in the counts filed prior to the running of the statute; or, applying the test that appellee contends for, whether a judgment on one could be pleaded in bar to a subsequent suit upon the other, and bearing in mind that the former verdict is conclusive only as to facts directly and distinctly put in issue, and the finding of which is necessary to uphold the judgment, and that the rule does not extend to facts which may be in controversy, but which rest in evidence and are merely collateral (Freeman on Judgments, § 257), and it must be apparent that the cause of action stated in the fourth additional count that appellant failed to warn appellee that the first train must be stopped, is not and could not be directly put in issue under any averment in either of the other counts, and that, if admitted at all, it would be merely collateral matter resting wholly in the evidence, and could not be relied on as a bar to an action based on the other causes named.

We think the cases of Swift & Co. v. Madden, 165 Ill. 41, 45 N. E. 979, Swift & Co. v. Foster, 163 Ill. 50, 44 N. E. 837, and North Chicago Rolling Mill Co. v. Monka, 107 Ill. 340, clearly distinguishable from the case at bar, as in each of them the same act or wrong is described, but described in different ways and that those cases do not conflict with our view concerning the pleadings in this case. The case of Chicago City Railway Co. v. McMeen, 206 Ill. 108, 68 N. E. 1093, is also cited. It is not in point. In that case the amendment was in matter of description of the locus

in quo. The original description laid it in Cook county, and also on "State street," in Chicago. By the amendment "Cottage Grove avenue" was substituted, and we held that such minuteness was not necessary; that the count would have been good, had it merely said the accident occurred in Cook county; that the allegation was not material or of the substance of the charge; and that the amendment did not state a new cause of action. In the case at bar appellee charges that the engine in which he was, was ditched because he was not warned that the train ahead of him "must be stopped." This was clearly matter of substance, and not of description. From the record it is evident that the jury so regarded it. The jury were asked to find specially if the defendant was negligent, and answered in the affirmative. They were also asked in what the negligence consisted, and answered, "By running train with a hot box at the highest speed, and in disregarding signals, and in failure to use signals at hand." These findings were responsive only to the fourth additional count, and the last element, "failure to use signals at hand," referred to fusees carried in the caboose of the first train, which, it is claimed, might have been thrown from it while running, to warn appellee that the first train was in trouble, and, as appellee says in his narr., that it "must be stopped." The demurrer to the plea of the statute of limitations should have been overruled.

Appellant urges that the court should have directed a verdict for it as requested at the close of all the evidence, as, it insists, the evidence shows appellee was injured through the negligence of fellow-servants, and that his injuries were due to risks ordinarily incident to the business in which he was engaged, and which risks were assumed by him. We regard these questions, under the circumstances shown by the evidence in this case, proper for the consideration and determination of the jury, and think the instructions fairly submitted them. As the case may be again tried, we refrain from a discussion of the evidence.

The judgments of the Superior and Appellate Courts are

reversed, and the cause will be remanded to the Superior Court for further proceedings not inconsistent with these views.

Reversed and remanded.

(64) HEFFRON v. ROCHESTER GERMAN INS. CO.
220 Ill. 514; 77 N. E. 262 (1906).

Scott, J. The original declaration in this case, as shown by the abstract, consisted of a count upon an account stated, with no special count. A judgment in favor of the plaintiff was reversed by the Appellate Court on the ground that the policy of insurance should not have been admitted in evidence under a declaration containing only the common counts. 89 Ill. App. 659. After the cause had been reinstated on the docket of the circuit court the plaintiff obtained leave to amend the declaration. The amended declaration contained three counts; the second being upon an account stated, and the first and third being upon a contract of fire insurance, the policy, which was for $2,500, being set out in full in the first count. To this amended declaration the defendant filed the plea of non-assumpsit, and to the first and third counts two other pleas, setting up, respectively, as defenses, the 12 months' limitation clause of the policy and that the cause of action did not accrue within 10 years. The plaintiff joined issue on the plea of non-assumpsit and traversed the other two pleas, concluding to the country. The defendant filed the similiter to these replications. Upon these issues the case was tried the second time. After all the evidence had been introduced the defendant moved the court for a peremptory instruction, and the plaintiff, as against this motion, presented to the court, for the consideration of the court but not as evidence for the jury, an affidavit by his attorney, the praecipe for summons, and the bill of exceptions containing the evidence and rulings on the former trial, for the purpose of showing that the cause of action for which the plaintiff was seeking to recover on the second trial, under

his amended declaration, was the same as that for which he originally intended to bring this action. The circuit court refused to consider the evidence so offered, on the ground that the cause of action for which the plaintiff originally intended to bring this suit must be ascertained from the original declaration and cannot be shown by extrinsic evidence. The plaintiff duly excepted. Thereupon the court gave the peremptory instruction, on the ground that the cause of action contained in the amended declaration was other than, and different from, the cause of action set up in the original declaration, and was barred, under the terms of the policy, by the fact that more than 1 year elapsed after the right to bring suit arose before the amended declaration was filed, and was also barred, under the statute of limitations, by the fact that more than 10 years elapsed after the cause of action had accrued before the amended declaration was filed. The plaintiff duly excepted to the giving of the peremptory instruction. A verdict was returned for the defendant, and judgment was rendered accordingly. This judgment has been affirmed by the Appellate Court, and the case is before us on appeal from that court.

Appellant presents a multitude of points and cites a large number of authorities, but there are really only two questions before this court for consideration; the first being whether or not the first and third counts of the amended declaration set up another and different cause of action from that contained in the original declaration, and the second being whether or not the court, in passing upon the motion for a peremptory instruction, should have considered the affidavit and bill of exceptions offered by the appellant.

First. Upon the face of the pleadings, and without reference to extrinsic facts, it is manifest that the counts of the amended declaration which plead specially the contract of insurance set up a different cause of action from the count upon an account stated in the original declaration. In Russell v. Gillmore, 54 Ill. 147, it was held that a recovery cannot be had, in an action for money had and re-

ceived, on a special contract, the breach of which is the gravamen of the action. In Fish v. Farwell, 160 Ill. 236 43 N. E. 367, it was held that, where the original declaration contained the common counts only, additional counts alleging an executory contract by the plaintiffs to manufacture and sell and by the defendants to select from samples and buy goods, and a refusal of the defendants to select, buy, and receive the goods, set up a distinct cause of action, as to which the bar of the statute of limitation will apply where the statutory period expires after the commencement of the suit and before the filing of such additional counts. It has been held by the Appellate Court that a recovery upon a policy of insurance cannot be had under the common counts. Supreme Lodge v. Meister, 78 Ill. App. 649; Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610. For additional authorities bearing on this question, and which lend support to the holding of the Appellate Court just mentioned, see Rockford Ins. Co. v. Nelson, 65 Ill. 415; Phoenix Mutual Life Ins. Co. v. Baker, 85 Ill. 410; Mutual Accident Ass'n v. Tuggle, 138 Ill. 428, 28 N. E. 1066; Chicago, Burlington & Quincy Railroad Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278 But it is urged that a recovery could have been had under the count upon an account stated, if appellant could have proved an adjustment of the loss and a promise, express or implied, to pay the amount, and that under the special count the appellant would not be required to prove even that much in order to recover. In such case, however, the recovery under the count upon an account stated would not be upon the policy of insurance, but upon a different contract, that is to say, the promise to pay the amount found due upon an accounting together. These are different contracts and constitute different causes of action.

Second. It is contended by counsel for the appellant that the court is not limited to a consideration and comparison of the original and amended declarations, but may receive extrinsic evidence, such as the affidavit and bill of exceptions offered in this case, for the purpose of determin-

ing whether the amended declaration sets up a new cause of action or is for the claim for which the action was intended to be brought. Certain propositions of law, thoroughly established by the decisions of this court, should be borne in mind in the consideration of this question. If the original declaration fails to state any cause of action whatever, the cause of action set up by amendment, after the statute of limitations has run, is barred. Mackey v. Northern Milling Co., 210 Ill. 115, 71 N. E. 448; Doyle v. City of Sycamore, 193 Ill. 501, 61 N. E. 1117; Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803. If an amendment to a declaration restates, in different form the same cause of action set up in the original declaration, the filing of the amendment relates back to the commencement of the suit, and the statute of limitations is not a bar, Chicago City Railway Co. v. McMeen, 206 Ill. 108, 68 N. E. 1093; Chicago & Eastern Illinois Railroad Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096. If an amendment introduces a new cause of action it is regarded as a new suit commenced when the amendment is filed, and the statute of limitations may be pleaded accordingly. Chicago City Railway Co. v. McMeen, supra; Fish v. Farwell, supra. Failure of the defendant to object and except to the filing of an amended declaration is not a waiver of his right to plead the statute of limitations; nor is the order of the court allowing an amended declaration to be filed an adjudication that the causes of action set up in the original and amended declarations are the same. Mackey v. Northern Milling Co. supra; Chicago City Railway Co. v. Cooney, 196 Ill. 466, 63 N. E. 1029.

Now, it is urged by the appellant that section 23 of the practice act, passed in 1872 (Laws 1871-72, p. 342), is practically a transcript of the Massachusetts statute on the same subject, passed in 1863, and that the adoption of the Massachusetts statute brought with it the construction which had been put upon that statute by the Massachusetts Supreme Court; that is to say, that the court, in allowing an amendment of a declaration, may receive extrinsic evi-

dence for the purpose of ascertaining the intention of the plaintiff in bringing his suit as the important element in the question of the identity of the causes of action. But the Illinois statute is not a transcript of the Massachusetts statute. The latter seems to have been a mere form followed in the enactment of the former, many changes having been made, some unimportant and some essential. Among these changes are the insertion in the Illinois statute of the words "in a civil suit," the omission of the words "except as otherwise provided," the insertion of the words "on such terms as are just and reasonable," the enlargement of certain phrases and the condensation of others, the substitution of the word "claim" for the word "cause," the omission of the important sentence "the cause of action shall be considered to be the same for which the action was brought, if the court finds that it is the cause of action relied on by the plaintiff when the action was commenced, however, the same may be misdescribed," and the substitution of the words "identity of the action" for the words "identity of the cause of action." As to the last change, the substitution of the word "action" for the words "cause of action," this court has held the change of phraseology to be so radical as to render inapplicable in this state the numerous decisions of the Massachusetts Supreme Court holding the judgment of the court allowing the amendment conclusive evidence of the identity of the cause of action. Fish v. Farwell, supra. On the contrary, it has been repeatedly held by this court, as has already been shown, that after the allowance of an amendment the statute of limitations may be pleaded, and that the allowance of an amendment does not in any manner interfere with the interposition of this defense. It is worthy of observation that the Massachusetts statute does not stop with the bare statement that amendments may be allowed which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought. Evidently the lawmakers doubted the sufficiency of this provision (which is all there is in Illinois statute on the subject) to effectuate

their intention. Therefore an additional clause was inserted in the statute, defining under what circumstances the cause of action should be considered to be the same for which the action was intended to be brought, which explanation or definition is in the following language: "If the court finds that it is the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed." All this is omitted from the Illinois statute. Why? Evidently because the General Assembly of this state did not intend to adopt the definition of the Massachusetts statute, or the decisions of the Massachusetts Supreme Court construing that statute, as the law of Illinois on the subject.

It seems to be admitted that in all the decisions of this court upon the statute in question—and there are many of them—such decisions have been based upon the pleadings, without reference to extrinsic evidence. But it is said that this is because the question has never been presented in any other manner, and that in no case decided by this court was evidence ever offered for the purpose of showing for what claim the plaintiff intended to bring his suit and that the amendment was for that claim. While it is true that the precise question now before this court has not been directly decided, yet there are statements in some of the opinions which are in opposition to the construction insisted upon by appellant, and the trend of the decisions is along the line which was followed by the lower courts in this case. In Fish v. Farwell, supra, the court was asked to consider the bill of particulars, in connection with the original declaration, in determining what was the original cause of action. Among the reasons assigned why this could not be done is the following: "But, in any event, we are wholly unable to see how the bill of particulars helps out the original declaration. A court cannot go outside of the declaration to ascertain the cause of action. Hart v. Tolman, 1 Gilman, 1. A notice or stipulation filed with the declaration forms no part of the declaration, and the declaration cannot be aided by reference to it." In

the same case it is also said: "The allegations contained in the original declaration, and also those found in the additional counts, are in the record of the very cause that is before the court for adjudication. In the nature of things there are no extrinsic facts by which they are to be explained. They lie open to the court and are subject to its inspection and consideration, and the court must determine, as a question, of law, whether the causes of action appearing in the additional or amended pleadings are separate and distinct causes of action from those originally declared upon, or mere restatements, in different form, of the same causes of action declared upon in the original declaration. The interpretation and construction to be placed upon pleadings is a question of law for the court, and not a question of fact for the jury. It would be absurd, and a confusion and destruction of the law, to submit to the decision of a jury the matter of the legal identity of the several causes of action which are alleged in the pleadings in a cause." Along the same line is the statement in a recent opinion of this court, which is as follows: "The question whether a new cause of action was introduced or whether the identity of the original cause of action was preserved is to be determined, as a question of law, by an inspection of the original and amended declarations." Metropolitan Life Ins. Co. v. People, 209 Ill. 42, 70 N. E. 643.

We hold that the correct construction of the statute in question is that the identity of the cause of action is to be determined by the court, as a question of law, by the inspection and consideration of the original and amended declarations. It follows that the circuit court did not err in refusing to consider the affidavit or bill of exceptions or in instructing the jury to find for the defendant, and that the Appellate Court did not err in affirming the judgment of the circuit court.

(65) McANDREWS v. CHICAGO, L. S. & E. RY CO. 222 Ill. 232; 78 N. E. 603 (1906).

Hand, J. This is an action on the case brought by the plaintiff, against the defendant, in the superior court of Cook county, to recover damages for a personal injury alleged to have been sustained by plaintiff while in the employ of the Illinois Steel Company at its South Chicago plant on the 16th day of July, 1901, by reason of certain cars being thrown by a locomotive engine under the control of the servants of the defendant, against a car which the plaintiff was unloading, whereby the plaintiff was thrown to the ground and run over and severely injured. The jury returned a verdict in favor of the plaintiff for the sum of $12,000, upon which the court, after overruling a motion for a new trial and in arrest of judgment, rendered judgment, which judgment, upon appeal by the defendant, was reversed by the branch of the Appellate Court for the First District, and a judgment in that court was rendered in favor of the defendant, and the plaintiff has sued out a writ of error from this court to review that judgment.

The original declaration, which was filed on February 21, 1902, contained but one count, which, omitting the formal part, was as follows: "For that, whereas prior to and on, to wit, the 16th day of July, A. D. 1901, the plaintiff was employed by the Illinois Steel Company at its mills or plant at South Chicago, in the county and state aforesaid, at which plant there were certain railroad tracks, and at the time and place aforesaid, while he was upon and about to unload a certain car standing upon one of said tracks, and while, as he alleges, he was exercising ordinary care and caution for his own safety, the defendant, Chicago, Lake Shore & Eastern Railway Company, through certain of its servants in that behalf, then and there recklessly, negligently, and without giving the plaintiff any warning, shoved certain other cars against the said car upon which the plaintiff was standing, as aforesaid, and the plaintiff was thereby then and there knocked down

upon said track and a certain car then and there passed over his leg," whereby he was injured, etc., to which original declaration the general issue was pleaded.

The plaintiff, November 17, 1903, which was more than two years subsequent to the date of his injury, amended his declaration, by leave of court, by filing two additional counts thereto, the first of which charges, in substance, that the plaintiff was in the employ of the Illinois Steel Company, and in the performance of his duty was upon a car which was standing on one of the unloading tracks in the yards of said steel company, which tracks were tracks of the defendant, and, while exercising due care and caution for his own safety, an engine of the defendant shoved a string of cars in on the tracks on which stood the car upon which the plaintiff was rightfully at work, and without timely warning to the plaintiff struck against said car violently, whereby the plaintiff was thrown from the car on which he was at work, to and across the track, and he was run over, etc. The second additional count was substantially the same as the first additional count, but contained the additional allegation that it was the duty of the defendant to exercise ordinary care to discover any one working about said standing car, and to give such person warning in order that he might avoid being injured; that the defendant did not take such precaution and did not discover that the plaintiff was on said car, and negligently shoved other cars against said car which the plaintiff was unloading, without warning to him, and, by the collision of said moving cars with the car which the plaintiff was unloading, he was thrown from the said car to the track and was run over and injured.

The defendant filed the general issue to said additional counts, also pleas of the statute of limitations. The plaintiff interposed a demurrer to said pleas of the statute of limitations, which was sustained, and, the defendant having elected to stand by its pleas, the case was tried upon the declaration as amended. At the close of all the evidence the defendant asked the court to instruct the jury to dis-

regard the original declaration, as it stated no cause of action. This the court declined to do. The defendant also, after verdict, moved in arrest of judgment, on the ground the original declaration was insufficient to support a judgment, which motion was also overruled. The Appellate Court reversed the judgment upon the ground the trial court erred in sustaining a demurrer to the pleas of the statute of limitations filed to said additional counts of the declaration, and remanded the cause, whereupon the plaintiff admitted of record in that court that there were no additional facts not already appearing in the record which could be pleaded to avoid the legal effect of the demurrer to said pleas of the statute of limitations, whereupon the Appellate Court set aside the order reversing the cause and entered an order overruling the demurrer to said pleas and entered a final judgment in that court in favor of the defendant in bar of the action. The correctness of the practice of the Appellate Court in that regard is not challenged in this court. The sole question therefore presented upon this record for decision in this court is: Does the original declaration filed in this case state a cause of action?

The original declaration charges the plaintiff was in the employ of the Illinois Steel Company at its plant at South Chicago, at which plant there were certain railroad tracks; that while the palintiff was upon and about to unload a certain car standing upon one of said tracks, and while he was exercising ordinary care and caution for his own safety, the servants of the defendant "then and there recklessly, negligently, and without giving the plaintiff any warning, shoved certain other cars against the said car upon which the plaintiff was standing." The criticism made upon the original declaration is that it does not aver facts showing the defendant owed the plaintiff the duty to notify him that it was about to move the cars which came in contact with the car upon which he was at work, prior to the time it moved said cars, and it is said that, although the defendant recklessly and negligently shoved said cars against the car upon which plaintiff was at work,

the defendant is not liable to him for a resulting injury therefrom, unless it owed him a duty to warn him that it was about to move said cars, prior to the time they were moved, and that it is not averred in the original declaration that the defendant knew, or ought to have known, the plaintiff was upon said car; nor are facts averred from which it appears that a duty rested upon the defendant to anticipate the presence of the plaintiff upon or in proximity to the car with which the moving cars came in contact. In actions of the character of this it is necessary to aver and prove three elements to make out a cause of action: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains: (2) a failure of the defendant to perform that duty; and (3) an injury to the plaintiff resulting from such failure. When these three elements concur, they unitedly constitute actionable negligence, and the absence of any one of these elements, either in the declaration or proof, renders the declaration insufficient to sustain a judgment for negligence, even after verdict or the proof to establish a cause of action involving actionable negligence (Schueler v. Mueller, 193 Ill. 402, 61 N. E. 1044; Mackey v. Northern Milling Co., 210 Ill. 115, 71 N. E. 448; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261); and it is not sufficient in the declaration to allege that it is the duty of the defendant to do certain things, as that would be but the averment of a conclusion, but the declaration must state facts from which the law will raise the duty (Ayers v. City of Chicago, 111 Ill. 406; Chicago & Alton Railroad Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; Schueler v. Mueller, supra).

In Schueler v. Mueller, supra, an action on the case was brought against the city of Chicago and the appellants to recover damages for a personal injury claimed to have been sustained by the appellee by falling through a trapdoor in a sidewalk upon one of the streets in the city of Chicago. The case was dismissed as to the city, and the appellants, who did not appear, were defaulted, and a jury

were sworn, who assessed the plaintiff's damages, upon which verdict a judgment was rendered. During the term at which the judgment was rendered the appellants moved to set aside and vacate the judgment. There was a failure to state in the declaration any facts showing how or why it was the duty of appellants to care for and guard the trapdoor in the sidewalk, and this court held, by reason of the lack of such averment, the declaration failed to show any duty from the defendants to the plaintiff to maintain and keep in safe condition said trapdoor, and that by reason of such omission the declaration failed to state a cause of action, and that the want of such averment in the declaration was not cured by verdict. And in Mackey v. Northern Milling Co., supra, an action was brought to recover damages for the alleged negligence of the milling company, which, it was averred, resulted in the death of the plaintiff's intestate. It was averred that the appellant's intestate was in the milling company's employ; that he was lawfully on the side track of the company when injured, and was in the exercise of due care for his own safety, when the milling company's servants, not the fellow servants of said intestate, pushed an unloaded car along said side track and upon said intestate without giving him any notice or warning of its approach, whereby he was injured, etc. The declaration failed to state that said intestate's duties necessarily required him to be on the side track at the time and place where he was injured, or that he was performing any duty he owed the milling company at that time and place, or that said company had any reason to believe or suspect that he would be at that place at the time of said injury, and it was held the declaration, for want of such averments, was so defective that it would not support a judgment. The court said (page 118 of 210 Ill., page 449 of 71 N. E.): "In the absence of averments showing that appellee [the milling company] owed Mackey [the intestate] some duty which was violated, and because of such violation said Mackey was injured while in the ex-

ercise of due care, the declaration must be held not to state a cause of action."

In this case, the only ground upon which the defendant could be held liable for actionable negligence in injuring the plaintiff would be that it owed the plaintiff a duty not to run its cars against the car upon which he was at work, without giving him warning of the approach of said cars in time for him to reach a place of safety before the cars collided, and that it neglected to perform such duty. There is found in the original declaration no averment of fact from which a duty to give the plaintiff such warning arises. It does not appear from the averments of the original declaration that the defendant knew, or was bound to know, that the plaintiff was on said car on in its vicinity, or that he was likely to be injured by the car upon which he was at work being moved by the cars being handled by the servants of the defendant. The original declaration therefore fails to show that the defendant owed the plaintiff any duty not to throw the cars being moved by its engine against the car upon which he was at work, without giving the plaintiff timely warning. The declaration, therefore, in that regard was fatally defective. In Mackey v. Northern Milling Co., supra, on page 117 of 210 Ill., page 448 of 71 N. E., it was said: "It is a well-established rule that a declaration, in cases of this character, must state facts from which the law raises a duty from the master to the servant, and, if the declaration fails in this regard, then it is insufficient to support a judgment. As stated in Ayers v. City of Chicago, 111 Ill. 406, 'the pleader must state facts from which the law will raise the duty.' And as said in Cooley on Torts (2d Ed.) 791: 'The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed.' And Mr. Thompson, in his work on Negligence (2 Thompson on Negligence, 1244) says: 'Unless the duty results in all cases from the stated facts, the declaration so framed will be bad.'" And in Schueler v. Mueller, supra (page 403 of 193 Ill., page 1044 of 61 N. E.): "It is not sufficient in a declaration

to allege generally the duty of the defendant, but the pleader must state facts from which the law will raise a duty, and show an omission of the duty and a resulting injury."

We think the original declaration stated no cause of action, and that the Appellate Court did not err in holding that the pleas' of the statute of limitations filed to the additional counts of the declaration were not vulnerable to a demurrer. It is, however, urged that a duty from the defendant to the plaintiff should be implied from the averment found in the original declaration that the cars were recklessly and negligently shoved against the car upon which the plaintiff was at work. A person may be guilty of a negligent or reckless act and still not be liable for actionable negligence. Liability only follows a negligent or reckless act when the party guilty of the act owes to the party injured some duty which is violated by the commission of the negligent or reckless act. Thompson on Negligence (volume 1, § 3), says: "Where there is no legal duty to exercise care, there can be no actionable negligence. Therefore it is reasoned that a plaintiff who grounds his action upon the negligence of the defendant must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him." And in Bishop on Noncontract Law, par. 446, it is said: "To sustain an action for negligence the plaintiff must have suffered a legal injury whereof he is entitled to complain. Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed, either directly to the plaintiff or to the public, in a matter whereof he had the right to avail himself, * * * there is nothing which the law will redress." And in South Bend Iron Works Co. v. Larger, 11 Ind. App. 367, 39 N. E. 209, it was said: "That the declaration was not cured by verdict where no facts were alleged showing that a duty was owed by the defendant, although there was an allegation that a certain hatchway into which the plaintiff fell was dangerous and

unprotected and without warning signs, and that because of the 'carelessness and negligence' of the said defendant in locating and constructing and maintaining said elevator the plaintiff was injured." It would appear to be clear that the averment therefor that the defendant shoved said cars negligently and recklessly, does not supply the want of an averment of facts showing that the defendant owed to the plaintiff a duty not to move said cars without notice to him.

It is also urged that the pleas of the statute of limitations do not aver that the original declaration stated no cause of action. The averments of the pleas are that the additional counts state "another and different cause of action." That averment we think equivalent to the statement that the additional counts state a "new and different cause of action." Clearly, if the original declaration stated no cause of action, and the additional counts state a good cause of action, they state "another and different cause of action" from that stated in the original declaration. In Mackey v. Northern Milling Co. supra, on page 121 of 210 Ill., page 450 of 71 N. E. it is said: "If, as we hold, the first declaration filed by appellant did not state any cause of action, then it must follow that if the declaration that was filed on March 4, 1902, did state a cause of action, it was a new or different cause of action, and, not being within the limitation of the statute, was thereby barred." It is manifest that, if the original declaration does not state a cause of action, additional counts stating a cause of action most certainly state another or different cause of action, viz., one which has never before been stated. Where it otherwise, the plaintiff, by his demurrer, would admit that the cause of action stated in the additional counts was stated for the first time in the additional counts, and having admitted that fact, and that the additional counts were not filed within two years after the cause of action accrued, judgment on the demurrer would have to go for the defendant.

It is also urged that, even though it be conceded the original declaration failed to state a cause of action, the

defect was cured by verdict. The rule is, if the declaration omits to allege and substantial fact which is essential to a right of action and which is not implied in or inferable from the findings of those which are alleged, a verdict for the plaintiff does not cure the defect. Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803. Here, one element of the plaintiff's cause of action, viz., the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains, was wholly omitted from the declaration, and the averment thus omitted cannot be implied or inferred from the facts which are alleged in the declaration. Such omission was therefore not cured by the verdict.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(66) C. & N. W. RY. CO. v. GILLISON.
173 Ill. 264 (1898).

[Case for Personal injuries. Opinion by Mr. Justice Cartwright.]

* * * More than two years after the injury to plaintiff he filed, by leave of court, an additional count to his declaration, and defendant interposed a plea of the Statute of Limitations to that count. To the plea so filed plaintiff demurred and the demurrer was sustained. The additional count set up no new cause of action, but alleged the same relation of master and servant between the parties, the same neglect of duty and consequent injury, as in the original declaration filed within the two years. We do not understand it to be claimed that the additional count was anything but a restatement of the same cause of action and in substantially the same way, but it is claimed that the practice of sustaining a demurrer to a plea of the Statute of Limitations which is perfect in form and without defect is improper, and that the plea called for a replication. It is a sufficient answer to the argument that the established practice in this State is that which was pursued in this case, and if upon a comparison of the original and

amended declarations, it is found that they are different modes of stating the same matter a demurrer will be properly sustained. North Chicago Rolling Mill Co. v. Monka, 107 Ill, 340; Eylenfelt v. Illinois Steel Co. 165 id. 185. * * *

(67) SUPREME LODGE v. McLENNAN.
171 Ill. 420 (1898).

[Assumpsit. Opinion by Mr. Justice Boggs.]

* * * The first assignment of error is that the declaration is insufficient in law and that the Superior Court erred in not carrying the demurrers to the special pleas back to the first defective pleading—the declaration. When the court decided the special pleas were obnoxious to the demurrers the plea of the general issue was on file. When the general issue is on file challenging the allegations of fact set out in the declaration, a demurrer to a special plea can not be carried back to the declaration (6 Ency. of Pl. & Pr. p. 332, and numerous decisions of this court cited in note 3.) Having withdrawn the demurrer to the declaration and filed a plea to the merits, the appellant must be regarded as having waived all objections to the declaration not going to the substance of the right of recovery. * * *

(68) BENNETT v. UNION CENTRAL LIFE INS. CO.
203 Ill. 444 (1903).

[Assumpsit on a policy of insurance. Opinion by Mr. Justice Boggs]

* * * We may first consider the assignment that the court erred in sustaining the demurrer presented to the replication filed on June 15, 1901. The appellee company is in error in the contention that the appellant can not be heard to urge that it was error to sustain the demurrer to said replication for the reason, to quote from the brief in its behalf, "the well-established rule in this state is, that where a demurrer is sustained to a pleading and the party

against whom it is sustained elects to plead over, he thereby abandons the former pleading, and in the Appellate Court no question can be raised as to those abandoned pleadings or as to whether demurrer was properly sustained to them or not. The only way to preserve such pleadings and demurrer for review by the Appellate Court is for the pleader to stand by the pleadings to which demurrer has been sustained. And this election must be shown by the record. It can not be done by simply taking exception to the rulings of the court in sustaining the demurrers" It is the well-established rule in this court that if a pleading is held insufficient on demurrer the pleader must abide his pleading, or, as is sometimes said, must elect to stand by has plea, if he would have the correctness of the judgment pronounced on the demurrer reviewed in a superior court; but it is not requisite he shall orally or in writing advise the court that he abides his pleading or elects to stand thereon. If he asks leave to amend the pleading in order to obviate the defect pointed out by the demurrer or asks leave to plead over, he thereby abandons his original pleading, and he may be heard to urge in a court of review that his steps from which a waiver or abandonment of his pleading is to be presumed, he has abided or "stood by" his pleading, and may be heard to urge in a court of review that his plea was good in law and that it was error to hold it insufficient on demurrer. If leave is given to plead over and another plea is filed and a demurrer is interposed and sustained to such latter plea, and no leave is asked or taken to amend or to plead further, or other steps taken indicating an abandonment, the decision of the court upon the demurrer remains an open question to be considered upon error. That the parties proceeded to trial on the issues made by other pleadings in the case has no tendency to indicate that the pleading to which the demurrer was sustained had been abandoned. The appellant in the case at bar, after the demurrers thereto had been sustained, did not ask leave to amend the replication or to reply over or anew, but went to trial on the issues formed by the plead-

ing. He abode or "stood by" his replication, and is free to urge in this court that the trial court erred in sustaining a demurrer thereto.

We find nothing in the cases cited by counsel for the appellee company at all inharmonious with the view here expressed. In each of such cases the pleader did not abide his pleading but pleaded over, and for that reason was deemed to have waived the right to urge that the court erred in its ruling upon the demurrer. In McLachlan v. Pease, 171 Ill. 527, the case most relied on by counsel for appellee, the plaintiff in the trial court filed a replication to the seventh plea of the defendant and a demurrer was sustained to such replication and leave was given to amend the replication, which was done. To this amended replication the defendant again demurred and the court sustained the demurrer, and the decision of the court in sustaining the demurrer to the amended replication was assigned as for error in this court, but we said: "Upon looking into the record it appears plaintiff did not stand by his replication [to which the demurrer had been sustained], but on July 24, 1896, he filed another replication upon which an issue was formed and the cause was submitted to the court for trial." The holding was, that the filing of the last replication waived the right to assign as for error the action of the court upon the prior replication. It does not appear from the bill of exceptions in the case at bar that the appellant excepted to the ruling of the court on the demurrer. Nor is it necessary such should be shown by the bill of exceptions. The pleadings are included in the record proper, and an alleged error based on a judgment rendered on the pleadings is reviewable on appeal without a bill of exceptions. Hamlin v. Reynolds, 22 Ill. 207; Safford v. Vail, Id. 326; Baker v. People, 105 Id. 452; 3 Ency. of Pl. & Pr. 406. * * *

(69) LLOYD v. SANDUSKY.
203 Ill. 626 (1903).

[Covenant on two deeds. Opinion by Mr. Justice Ricks.]

* * * To the action of the court in overruling plaintiff's demurrers to the fifth and sixth pleas no exception was taken or preserved in the record. On this point the record states: "And now said plaintiff files a demurrer to the fifth and sixth pleas, as amended, which demurrer to said fifth and sixth pleas is overruled by the court. * * *

Appellees contend that the ruling of the court upon the demurrers to the fifth and sixth pleas is not open to review by us, because of the failure of appellant to except thereto and have it noted of record. In this contention appellees are in error. All the questions arising here are upon the record proper, and as they relate to rulings with respect to pleadings, which are a part of the record, and which alleged errors are of law, when such is the case an appellate tribunal may review and pass upon the errors thus appearing, without a bill of exceptions, or without exceptions appearing in the record. The office of a bill of exceptions is to introduce matter into the record, but where the record shows, upon its face, all the rulings and decisions, a bill of exceptions is unnecessary. Randolph v. Emerick, 13 Ill. 344. * * *

(70) CITY OF GALENA v. GALENA WATER CO.
229 Ill. 128; 82 N. E. 421 (1907).

Farmer, J. We understand appellant to contend that the demurrer was special, and that the right of the parties to join as plaintiffs was not one of the special grounds of demurrer. The first part of the demurrer was in the usual form of a general demurrer, and concludes by praying judgment that plaintiffs be barred from maintaining their action. Following that are 14 causes of demurrer. None of them go to the form of the declaration, and while none of the special causes assigned say, in so many words, that there was a misjoinder of parties plaintiff, they all relate to the

right of the plaintiffs to maintain the action, and some of them question the right of the board of directors to maintain any action under the contract set out in the declaration. We think the demurrer properly raised the question of the right of the board of school directors to maintain the action or to join with the city of Galena as a coplaintiff. The judgment of the Appellate Court, as shown by the opinion of that court, was based upon the proposition that appellants were improperly joined as coplaintiffs in the suit, and that this question was properly raised by the demurrer. The averment of the declaration as to title is that the building was owned by the city of Galena, but was controlled and managed by the school directors of district No. 120. It would seem, under that averment, that there is no room for argument as to the impropriety of joining both parties as coplaintiffs, and this question is properly raised by demurrer. 1 Chitty's Pl. 66; 1 Tidd's Pr. 694. * * *

(71) DEVINE v. CHICAGO CITY RY. CO.
237 Ill. 278 (1908).

[Case for Personal injuries. Opinion by Mr. Justice Carter.]

The defendant filed a general and special demurrer to the declaration. No issue was joined on this demurrer, and the declaration and demurrer were all the pleadings in the case. The case was called, both parties being represented by counsel, and a jury was empaneled without either party saying anything about the condition of the pleadings. The attention of the trial court does not seem to have been specifically called to this question at any time. The instructions asked do not mention it. The motion for new trial although it sets out particularly twenty-six different reasons why a new trial should be granted, does not call attention to it, and while a formal motion for arrest of judgment appears to have been made, the record does not disclose that the court's attention was then called to this point. Apparently it was first raised in the Appellate Court. Appellant argues that this is an error that

appears on the face of the record, and hence can be raised in a court of review for the first time. Conceding, for the sake of argument, that this is true, is the error of such nature as to require the reversal of this case? It must be admitted, as was stated by Mr. Justice Breese in Hopkins v. Woodward, 57 Ill. 62, that the cases in this State on this question are not in entire harmony. This court held that where, while demurrer is pending, general and special pleas are filed to the count demurred to, the demurrer is thereby waived and no judgment need be pronounced on it. (Walden v. Gridley, 36 Ill. 523). Substantially to the same effect are Davis v. Ransom, 26 Ill. 100 Eldbrooke v. Cooper, 79 id. 582, Hull v. Johnston, 90 id. 604, Shreffler v. Nadelhoffer, 133 id. 536, and Chicago and Alton Railroad Co. V. Clausen, 173 Ill. 100. We have also held that if the parties appear and go to trial without a plea being put in, it is such an irregularity as will be held waived and cured by the verdict under the Statute of Amendments. (Brazzle v. Usher, Breese, 35). To the same effect are Loomis v. Riley, 24 Ill. 307, Strohm v. Hayes, 70 id. 41, Barnett v. Graff, 52 id. 170, and First Nat. Bank v. Miller, 235 id. 135. It has been held it is error to render judgment by default on demurrer to one of the counts in the declaration when one of the special pleas remained undisposed of. (Bradshaw v. McKinney, 4 Scam. 54; Steelman v. Watson, 5 Gilm. 249). It has also been held that where a demurrer remains undecided as to a part of the counts of a declaration it is erroneous to try the case and render final judgment against the defendant on the other counts. (Bradshaw v. Hoblett, 4 Scam. 53; Weatherford v. Wilson, 2 id. 253). This court in Nye v. Wright, 2 Scam. 222, held that where the record showed that a demurrer had been filed in the court below by the defendant and the plaintiff had joined in the demurrer, it was error to proceed with the cause and submit it to a jury upon its merits without first disposing of the demurrer. The doctrine of that case has been upheld in Moore v. Little, 11 Ill. 549, and Chapman v. Wright, 20 id. 120, and substantially to the same effect

are Richeson v. Ryan, 15 id. 13, and Sammis v. Clark, 17 id. 398. In Lincoln v. Cook, 2 Scam. 61, it was held that where the record stated that the court sustained the demurrer to the first plea of the defendant, and that after replication filed to certain other pleas issue were joined by agreement of parties and the cause submitted to a jury, the parties must be considered as waiving all objections to the form of the pleadings on either side. In Parker v. Palmer, 22 Ill. 489, the conflict in the decisions here under discussion was noticed, and it was there said that the Court did not intend to go one particle beyond the point to which the decided cases lead, and that where there is an unanswered demurrer on record and the party filing it goes to trial by consent it will not be cause for reversal of the judgment. Again, in Williams v. Baker, 67 Ill. 238, it was held that where a defendant who has demurred to a declaration consents to a trial of the case and it is tried on the merits it amounts to a waiver of any benefit he might otherwise have had from the demurrer. Again, in Hopkins v. Woodward, supra where the trial court proceeded to trial upon issues of fact formed without deciding a demurrer to a plea, there being no joinder in demurrer, this court, after stating that the decisions were conflicting, held that the irregularity was not such as to authorize a reversal, the defendant not having placed himself in a position to demand a decision as to the demurrer. In Belleville Nail Mill Co. v. Chiles, 78 Ill. 14, the exact situation as it appears here on the record was apparently presented, and this court held that where the parties go to trial by consent, with a demurrer to a count of the declaration undecided, it is no cause for reversal of the judgment.

Counsel for the appellant argue that some of these last cases are different from this case, because a jury was there waived. This is not true of the last case, as there the trial was by jury. Counsel in this case, as in that case, consented to go to trial.

Counsel for appellant, however, insist that the latest utterance of this court in Jocelyn v. White, 201 Ill. 16, up-

holds their contention, as Nye v. Wright was quoted with approval on this point. While it is true there are some expressions in that case unnecessary for its decision, which tend to uphold appellant's contention, it is also true that on page 22 of that case this court said: "If, then, one does not waive his undisposed of demurrer by proceeding to trial without plea and without calling it up, it would seem that the court would be going very far to hold that he had waived his rights thereunder where such a demurrer was, in fact, overruled, merely because he failed to expressly give notice to the court, and to have the same entered of record that he had elected to abide by such demurrer." It is therefore very clear that the court in that case was of the opinion that this question could be waived by proceeding to trial without plea and without calling the demurrer up for disposition. While it may have been a technical error to proceed to trial before a jury on issues of fact without disposing of this demurrer, we think it is the better practice and in accord with the later decisions of this court to hold that such error was waived by appellant by proceeding to trial the same as if the case was at issue on the facts, and cannot be raised for the first time after verdict. * * *

(72) HIGHLEY v. METZGER.
186 Ill. 255 (1900).

[Assumpsit. Opinion by Mr. Chief Justice Boggs.]

* * * It is complained the court proceeded to a hearing of the case and entry of judgment against appellant despite the objection presented by appellant that the cause was not at issue. Nothing was wanting to put the cause formally at issue except a similiter on the part of appellant to a replication to appellant's special plea. The replication contained no new matter, but simply re-stated, by way of denial, the allegations of the plea and concluded to the country. A similiter thereto was but the merest formality. Its absence in nowise affected the admissibility of evidence or a full and fair hearing of the cause on the merits. The

appellant refused to participate in the trial. It was not made to appear, by affidavit or otherwise, the appellant was not fully prepared and ready to present his testimony and make his defense, or that he had any defense to the action. He does not complain the judgment was not fully supported by the testimony produced at the hearing. From the whole record it is clear he was not injured or prejudiced by the absence of a formal similiter. It is a familiar rule, error merely technical in character and harmless in result is not ground for reversing a judgment.

(73) MORSE CO. v. EATON.
91 Ill. App. 413 (1899).

[Opinion by Mr. Justice Horton.]

* * * It is here contended by counsel for appellant, that the mere filing with the clerk of the court below of a motion in writing for a new trial during the term at which the judgment was entered without calling thereto the attention of the court or opposing counsel, is all that is required by the statute, and that, in effect, the judgment was thereby stayed until the motion thus filed is decided by the court. That portion of the Practice Act (Hurd's Stat. of 1898, Ch. 110, Sec. 57), which it is claimed supports this contention is as follows:

"If either party may wish to except to the verdict, or for other causes to move for a new trial or in arrest of judgment, he shall, before final judgment is entered, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment shall thereupon be stayed until such motions can be heard by the court."

That statute is not properly subject to the interpretation contended for by appellant. It does not provide that the motion may be filed at any time during the term. It presupposes a motion made, and then provides that "the points in writing particularly specifying the grounds of such motion," that is, a motion made for a new trial, may be

filed during the term at which the judgment was entered. It does not provide that a motion may be made by simply filing a paper with the clerk of the court.

Mr. Justice Gary, in delivering the opinion of the court in Washington Park Club v. Baldwin, 59 Ill. App. 61, said:

"Can a paper, purporting to be a motion in a cause, filed with the clerk of the court without notice to anybody interested, and which, so far as the record shows, may never have come to the knowledge of the court or opposing counsel, be a motion that stops proceedings, and which may thereafter be exhumed, and be held to be sufficient cause for undoing all that, except for that paper, was regularly done? That such a paper is not a motion, is old law. (Prall v. Hunt, 41 Ill. App. 140.)

* * * Making out and filing an application is not to make a motion. The attention of the court must be called to it."

We entirely agree with the conclusion that secretly filing such a paper with the clerk of the court is not making a motion in a case. * * *

(74) SHAUGHNESSY v. HOLT.

236 Ill. 485 (1908).

[Mr. Justice Carter delivered the opinion of the Court.]

Appellant contends that there was no valid declaration upon which a recovery could be had. Each of the first three counts of the original declaration, after stating the negligence, concluded, "by means whereof the plaintiff was then and thereby injured, as hereinafter set forth." The original fourth count, to which the quotation from the first three counts above given referred, was stricken out by order of court, March, 1905, and the motion of appellee for leave to file an amended fourth count denied. It is insisted that the three remaining counts contained no allegation that appellee suffered injury to her person. On February 4, 1906, the appellee filed additional counts to the declaration. Such counts stated no new cause of action, but each merely al-

leged in a more accurate and legal manner the same damages that were averred in the original fourth count. It is insisted by the appellant that the fourth count having been stricken, it was out of the case for all purposes, (Slack v. Harris, 200 Ill. 96), and could not be used as a basis for the additional counts or be made a part of the three original counts by reference. Under the authority of North Chicago Street Railroad Co. v. Aufmann, 221 Ill. 614, this fourth count furnished sufficient basis for the additional counts filed. After the count was stricken out, while no longer, in legal contemplation, a pleading in the case, it still remained on file as a part of the record. (Abbott v. Douglass, 28 Cal. 295). It is a mere figure of speech to say that the count is stricken out. Even when a section of the statute has been held to be unconstitutional it may still be considered with the other sections for the purpose of construction. (Baird v. Hutchinson, 179 Ill. 435). The original fourth count was still a part of the declaration for reference purposes. * * *

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